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IN THE

Supreme Court of the United States

October Term, 1961

No. 282

LEIGHTON BEARD,
Respondent,

v.

ELLERMAN LINES, LTD.
and
THE CITY LINE LTD.,
Respondents,

v.

ATLANTIC AND GULF STEVEDORES, INC.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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INDEX.

	Page
Opinion of the Courts Below	2
Jurisdiction	2
Constitutional Provisions Involved	2
Questions Presented	2
Statement of the Case	3
Reasons Relied Upon for Allowance of the Writ	7
First Point: The Decision of the Court Below Reversing a Judgment Entered Upon the Unanimous Verdict of a Jury Violates the Provisions of the Seventh Amendment to the Constitution of the United States Which Provides That "No Fact Tried by a Jury, Shall Be Otherwise Re-Examined in Any Court of the United States, Than According to the Rules of the Common Law," There Being No Rule of Law Making Such a Finding by the Jury Improper	7
Second Point: The Decision of the Court Below Is in Conflict With the Rule Laid Down in the Decisions of the Supreme Court in American Stevedores, Inc. v. Porello, 330 U. S. 446, 91 L. Ed. 1011, 67 S. Ct. 847, and Weyerhaeuser Steamship Co. v. Nacirema, 355 U. S. 563, 2 L. Ed. 491, 78 S. Ct. 438 (1958) Which Hold That in the Presence of a Written Contract All Fact Issues Involved in the Third Party Action, Including the Intention of the Parties to Such Writing, the Extent, Scope and Application of the Contractual Obligations Between the Shipowner and Stevedore, and Whether They Were Breached Are Issues to Be Decided by the Jury	17
The Court of Appeals Reversed the Findings of the Jury and the Judgment Entered Thereon Upon the Erroneous Conclusion That the Trial Judge Failed to Submit to the Jury the Question of Unsafe Place to Work in Determining Whether Petitioner Breached Its Contractual Obligation	27

INDEX (Continued).

Page

The Court of Appeals Erroneously Reversed the Findings of the Jury and the Judgment Entered Thereon in Total Disregard of the Evidence in Support of the Verdict Without Reference to the Terms of the Express Written Contract Between the Parties and Seizing Upon a Suggestion by Counsel for Petitioner, That the Jury Could Have Found Negligence of the Shipowner on the Basis of Improper Stowage, Assumed That the Jury in Fact So Found, Totally Disregarding That Other Independent Grounds of Negligence of Shipowner of Which the Jury Acquitted Petitioner, Were Equally Supported by the Evidence 29

Third Point: The Conflict Between the Court Below and the Courts of Appeal for the Second, Fourth, and Ninth Circuits, and Between Divisions of the Third Circuit and the Conflict Between Decisions Within Each of These Circuits 33

Fourth Point: The Issues Involved Herein Are of Paramount Importance to the Survival of the Stevedoring Industry and to the Entire Shipping Industry 42

CONCLUSION 43

APPENDIX:

Judgment of the U. S. District Court 1a

Order of the U. S. District Court 2a

Opinion of U. S. C. A. 3 ..... 3a

Order of U. S. C. A. 3 Denying Petitions for Rehearing 18a

Order of U. S. C. A. 3 Staying Issuance of Mandate 19a

Judgment of U. S. C. A. 3 ..... 20a

TABLE OF CASES CITED.

Pages

American Export Lines v. Revel, (4th Cir.) (1959) 266 F. 2d 82 ..... 23, 34, 38, 40

American President Lines Ltd. v. Marine Terminal Corp., 236 F. 2d 753 (9th Cir. 1956) 26, 34, 35, 41

Amerocean Steamship Co. v. Copp, 245 F. 2d 291 (9th Cir. 1957) 33, 35, 41

American Stevedores, Inc. v. Porello, 330 U. S. 446, 91 L. Ed. 1011, 67 S. Ct. 847 ..... 17, 23, 24, 25, 26, 27, 29, 31, 33, 41

Bailey v. Central Vermont R. Co., 319 U. S. 350 14

Baltimore & C. Line v. Redman, 295 U. S. 654 (1935) 8

Baltimore & Ohio R. R. Co. v. Griffith, 159 U. S. 603, 16 S. Ct. 105, 40 L. Ed. 274 13

Bentz v. Compania De Navigacion, 213 F. 2d 397 (2nd Cir. 1954) 35

Berry v. United States, 312 U. S. 450 9

Blair v. Baltimore & Ohio R. R. Co., 323 U. S. 600, 89 L. Ed. 490 14

Bollenbach v. U. S., 326 U. S. 607, 66 S. Ct. 402, 90 L. Ed. 350 9

Booth Steamship Company v. Meier and Oelhaf Company, 262 F. 2d 310 (2nd Cir. 1958) 34, 37

Burcham v. J. P. Stevens Co., 209 F. 2d 35 13

Calmar Steamship Corporation v. Nacerima Operating Company, 266 F. 2d 79 (4th Cir. 1959) 23, 34, 35, 38

Chicago R. I. & P. R. Co. v. Williams, 245 F. 2d 397 31

Crumady v. Joachim Hendrik Fisser, 358 U. S. 423 ..... 18, 22, 23, 24, 26, 38, 40

Curtis v. A. Garcia Y Cia, 272 F. 2d 235 (C. C. A. 3rd 1959) .. 9

Dimick v. Scheidt, 293 U. S. 474 (1935) 8

Downing v. Union Paving Co., 184 F. 2d 481 (C. C. A. 3rd 1949) 16

Ferroline Corp. v. General Analine & Film Corp., 107 F. Supp. 326, affirmed 207 F. 2d 912, cert. denied 74 S. Ct. 678, 347 U. S. 953, rehearing denied 74 S. Ct. 748, 347 U. S. 979 32

TABLE OF CASES CITED (Continued).

Pages

Frankel v. Johns Manville Corp., 257 F. 2d 508 31

Gasoline Products Co. v. Champlin Ref. Co., 283 U. S. 494 (1931) 8

Grand Trunk Ry. Co. v. Ives, 144 U. S. 408 12

Hagans v. Farrell Lines, Inc., 237 F. 2d 477 (1956) 15, 16, 34, 36, 38, 39, 40, 41

Halcyon Lines v. Haenn Shipceiling & Refitting Corp., 342 U. S. 282, 96 L. Ed. 318, 72 S. Ct. 277 .....18, 43

Haver v. Bond Stores, 178 F. 2d 836 (C. C. A. 6th 1950) 32

Hodgson v. Lloyd Brasileiro Patrimonio Nacional (decided July 6, 1961 by Circuit Judges Kalodner, Staley and Hastie) 15, 16, 34, 39, 40, 41

Lavender v. Kurn, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740 14

Liberty Mutual Insurance Company v. Thompson, 171 F. 2d 723 (C. C. A. 5th 1948) 9

Martin v. City of Port Huron, 111 F. 2d 759 (C. C. A. 6th 1940) 32

McAllister v. United States, 348 U. S. 19, 99 L. Ed. 20, 75 S. Ct. 6 16

Montgomery Ward v. Duncan, 311 U. S. 250 9

Parsons v. Bedford, 3 Pet. 447, 7 L. Ed. 732 8

Pierce v. Erie R. Co., 165 F. Supp. 216, aff'd 264 F. 2d 136 ... 32

Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, 98 L. Ed. 143, 74 S. Ct. 202 18

Reddick v. McAllister Lighterage Line, 258 F.2d 297 (2nd Cir., 1958); certiorari denied 358 U. S. 908, 3 L. Ed. 2d 229, 79 S. Ct. 235 .....34, 36, 41

Ryan Stevedoring Co. v. Pan Atlantic S. S. Corp., 350 U. S. 141 .....18, 20, 21, 23, 24, 26, 32, 36, 37, 39

C. F. Salamy v. New York Central System, 146 N. Y. S. 2d 814 31

Seas Shipping Co. v. Sieracki, 328 U. S. 85, 90 L. Ed. 1099, 66 S. Ct. 872 .....17, 18, 34

Sentilles v. Inter-Carribean Shipping Corp., 361 U. S. 107, 4 L. Ed. (2) 142, 80 S. Ct. 173 .....13, 16

Shannon v. United States, 235 F. 2d 457 (2d Cir. 1956) 40

TABLE OF CASES CITED (Continued).

	Pages
Smith v. Pan Atlantic Steamship Corporation, 161 F. Supp. 422 (E. D. Pa. 1957) aff'd per curiam, 254 F. 2d 600 (3rd Cir. 1958)	30, 39, 40
States Steamship Co. v. Rothchild International Stevedoring Co., 205 F. 2d 253 (9th Cir. 1953)	35
The Texas Company v. Gianfala, 350 U. S. 879, 100 L. Ed. 775	13
Texas & Pac. R. Co. v. Gentry, 163 U. S. 353, 16 S. Ct. 1104, 41 L. Ed. 186	13
Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29 (1944), rehearing denied 321 U. S. 802	16
Thompson-Starrett Co. v. Otis Elevator Co., 271 N. Y. 36, 2 N. E. 35	31
Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54	14
United States v. Harrison, 245 F. 2d 911 (9th Cir. 1957)	33, 34, 41
U. S. v. Alfred Manuszak, 234 F. 2d 421	9
United States v. Rothchild International Stevedoring Co., 183 F. 2d 181 (9th Cir. 1950)	34, 36, 41
Walker v. New Mexico & S. P. R. Co., 165 U. S. 593 (1897)	8
Weyerhaeuser Steamship Co. v. Nacirema, 355 U. S. 563, 2 L. Ed. 2d 491, 78 S. Ct. 438 (1958)	11, 15, 17, 18, 20, 23, 24, 25, 27, 29, 30, 31, 32, 33, 36, 37, 39, 41
Waterman S. S. Corp. v. Dugan & McNamara, 5 L. Ed. 2d 169 (1960)	24, 26

STATUTES AND AUTHORITIES CITED.

	Pages
42 C. J. S. Indemnity Section 5	31
Federal Rules of Civil Procedure, 28 U. S. C. A.:	
Rule 50	8
Rule 50(b)	8
Longshoremen's and Harbor Workers' Act (33 U. S. C. Sec. 901 et seq.)	11
Section 5	18
United States Constitution, Seventh Amendment	2, 7, 9, 15, 17

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ATLANTIC AND GULF STEVEDORES, INC.

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, *The Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioner, Atlantic and Gulf Stevedores, Inc., respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered on April 7, 1961, reversing the judgment of the District Court of the United States for the Eastern District of Pennsylvania, and the appeal docketed in the said Court of Appeals as No. 13,278, and the order of the said Court denying rehearing entered on May 31, 1961.

OPINION OF THE COURTS BELOW.

The District Court did not file an opinion. The opinion of the Court of Appeals for the Third Circuit is recorded in 289 F. 2d 201 (*infra*, p. 3a). The Court of Appeals for the Third Circuit did not file an opinion denying the petition for hearing of Atlantic and Gulf Stevedores, Inc.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 7, 1961 (*infra*, p. 20a). The Order denying the Petition for rehearing was entered on May 31, 1961 (*infra*, p. 18a). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED.

U. S. C. Constitution Amendment VII—Civil Trials.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

QUESTIONS PRESENTED.

No. 1. In a suit by a shipowner claiming indemnity from a stevedoring contractor is not the reversal of a judgment founded on a special verdict of the jury that a stevedoring contractor was not negligent or in breach of its contractual obligations, there being no rule of law making such finding by the jury improper, a re-examination of facts tried by a Jury otherwise than according to the rules of the Common Law and as such a violation of the Seventh Amendment of the Constitution of the United States?

No. 2. Where a shipowner and a stevedoring contractor enter into a written contract which expressly defines the obligation of each, and a Jury's special verdict acquits the stevedore of any failure to do its work in accordance with the contractual obligation is it not error for an Appellate Court to set aside the factual finding of the Jury and reverse a judgment entered upon such verdict on the ground that the stevedore, as a matter of law, breached its warranty to perform the obligations of the contract with reasonable safety?

No. 3. Where the verdict of a jury is based upon substantial and competent evidence, and the Trial Court's charge encompassed all of the issues raised by the pleadings, proofs and the contractual obligations of the parties, may the Court of Appeals reverse such verdict without a holding or showing that the special verdict of the jury is clearly erroneous?

STATEMENT OF THE CASE.

Leighton Beard, resident and citizen of Pennsylvania, brought this civil action, founded upon the diversity jurisdiction of the District Court against Ellerman Lines, Ltd. and The City Line, Ltd., British corporations, hereinafter referred to as "Ellerman", to recover damages for serious injuries sustained in the course of discharging bales of burlap from the latter's vessel, S. S. "City of Calcutta". The accident occurred July 1, 1955. Beard, a longshoreman, was employed by Atlantic & Gulf Stevedores, Inc., hereinafter referred to as "Atlantic", a concern engaged in stevedoring services for Ellerman.

Beard's complaint against Ellerman alleged that the latter's vessel was unseaworthy and that Ellerman was negligent. Ellerman impleaded Atlantic as a third-party defendant alleging that Beard's injuries resulted from Atlantic's failure to properly perform the work of unloading

the cargo, using a negligent manner to unload the cargo, using devices that were dangerous, improper and in violation of its agreement with Ellerman (11a, Appellant's Appendix). Ellerman sought indemnity from Atlantic, under their contract, in the event it was held liable to Beard.

The undisputed facts indicate that the bales of burlap had been loaded in India. The bales in question weighed approximately eleven hundred pounds, measuring two feet by three feet by four feet and were stowed in the lower 'tween deck of the number one hatch of the Ellerman vessel, the "S. S. City of Calcutta". Atlantic played no part in the loading or stowage of this cargo.

There were sixty-three tons of New York bales in the forward end of the hold extending out halfway into the square of the hatch, adjoining one hundred tons of Philadelphia bales of burlap stowed to an equal height and extending to the after end of the hold. Though the vessel arrived from New York, no evidence was offered to explain why the New York bales had not been discharged. The bales were tightly bound by four parallel one-inch bands, each bale containing thirty to forty bolts of burlap and were tightly stowed in layers on tiers.

The discharging operation consisted of pulling the bales from their tightly stowed position to the square of the hatch by winches and raising them vertically out of the vessel and on to the pier. This was accomplished by use of a ring to which six equal length ropes were attached. A large flat-end hook on the end of each rope was inserted under the metal bands which compressed the bales, using two hooks per bale. Three bales were thus raised together. Beard and his fellow longshoremen would then signal the winch operator to pull the bales from their stow to the hatch square, and after overcoming side-sway, the bales would be raised vertically. The holdmen would then seek shelter away from the square of the hatch protected by the coaming. After about three hours of such operation, two tiers of the Philadelphia bales had been removed. As a draft of three bales was being lifted out of the hatch to a

height of approximately thirty feet, in a vertical lift, the two bands of one bale broke, causing the bale to fall. It struck the New York cargo and bounded in the direction of Beard, pinning him against the after bulkhead and causing injuries which necessitated the amputation of his right leg above the knee. No other bales were known to have fallen while being lifted vertically prior to the accident in question or during the years of experience of any of the witnesses or experts who testified in the case.

The case was tried before the Honorable Chief Judge J. Cullen Ganey and a jury. After ten days of trial the issues were presented to the jury upon five interrogatories, phrased after much discussion in a form agreed upon by counsel (185b-215b). After deliberation, the jury returned with the following answers to interrogatories (187a-189a):

1. Was unseaworthiness a substantial factor in causing the injuries to the Plaintiff?
   Yes.
2. Was there negligence on the part of Ellerman Lines, Ltd., which was a substantial factor in causing injuries to the Plaintiff?
   Yes.
3. In what amount, if any, did you assess the damages to be awarded the Plaintiff?
   $100,000.00.
4. If you have answered "yes" to interrogatories 1 or 2 did the fault of Ellerman Lines, Ltd., and the City Line, Ltd. arise out of any failure on the part of Atlantic and Gulf Stevedores, Inc., to do its work in accordance with the contractual obligation?
   No.
5. If you have answered "yes" to interrogatory No. 4, was Atlantic and Gulf Stevedores, Inc.'s breach of this contract a substantial factor in bringing about the injuries to the Plaintiff?
   No.

The District Court entered judgment on the special findings of the jury in favor of Beard against Ellerman and in favor of Atlantic upon Ellerman's claim for indemnity. Ellerman's motions for judgment n.o.v. or for a new trial, were denied on April 4, 1960 without opinion and Ellerman appealed to the Court of Appeals for the Third Circuit. On April 7, 1961 the Court of Appeals for the Third Circuit affirmed the judgment in favor of Beard and against Ellerman, but reversed the finding of the jury and the judgment in favor of Atlantic upon the reasoning that if the jury based its finding of negligence against Ellerman for improperly stowing the New York cargo adjoining the Philadelphia cargo thus creating an unsafe place to work, it was equally negligent for Atlantic to handle the cargo. The Court erroneously found that the District Court had limited the sole criterion of the jury's test as to whether Atlantic had breached its contract of workmanlike service, to the use of the bale hook method alone and, without regard to whether the discharge operation was conducted in an unsafe place. The charge demonstrates that the District Court did not so limit the jury's test (171a, 172a, 173a, Appellant's Appendix).

The Court of Appeals found as a matter of law that Atlantic was liable to Ellerman for indemnity for breach of its warranty to perform the obligations of the contract with reasonable safety. The issue of unseaworthiness was not considered by the Court.

Petitioner moved for rehearing upon the grounds that the weight of the evidence supported the jury's verdict,[1] that no evidence was presented to support the conclusion that Atlantic was negligent as a matter of law, that the action of the Court was in violation of the Seventh Amend-

1. The witnesses and all of the experts described Atlantic's unloading operations, methods and procedures as follows:

"safe method of unloading this cargo" (59b); "unusual and customary" and as a "safe method" (123b); "perfectly safe for unloading bales which weigh 1,000 to approximately 1,400 pounds" (160b); Ellerman's expert described the methods and procedures as the "safest customary method" (83b, 85b).

ment to the Constitution and that the Court erred in holding Atlantic liable as a matter of law notwithstanding that the jury found no breach of Atlantic's written contract. Petitioner further contended that the Court erred in concluding that the District Court failed to submit to the jury the issue of "unsafe place to work" since the instructions to the jury encompassed all of the issues raised in the pleadings, during the trial and the terms of the contract which was offered in evidence.

The Court of Appeals denied the Petition for a rehearing without opinion.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

First Point: The Decision of the Court Below Reversing a Judgment Entered Upon the Unanimous Verdict of a Jury Violates the Provisions of the Seventh Amendment to the Constitution of the United States Which Provides That "No Fact Tried by a Jury, Shall Be Otherwise Re-Examined in Any Court of the United States, Than According to the Rules of the Common Law," There Being No Rule of Law Making Such a Finding by the Jury Improper.

The decision of the Court of Appeals in the instant case reversing the unanimous verdict of impartial jurors was a capricious and unreasonable action directly contrary to the provisions of the Seventh Amendment to the Constitution of the United States. The decision marks another step in the gradual erosion which has unfortunately worn away part of the essential guarantee of the Seventh Amendment.

The Seventh Amendment to the Constitution of the United States provides:

> "In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial

by jury shall be preserved, *and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*" (Emphasis added.)

The amendment has for its primary purpose the preservation of "common law distinction between the province of the Court and that of the jury, whereby, in the absence of express or implied consent, issues of law are resolved by the Court and issues of fact are resolved by the jury under appropriate instructions of the Court": *Baltimore & C. Line v. Redman*, 295 U. S. 654, 657 (1935); *Walker v. New Mexico & S. P. R. Co.*, 165 U. S. 593, 596 (1897); *Gasoline Products Co. v. Champlin Ref. Co.*, 283 U. S. 494, 497-499 (1931); *Dimick v. Scheidt*, 293 U. S. 474, 476, 485-86 (1935).

The aim of the amendment to preserve the historic line separating the province of the jury from that of the judge, still permitted procedural improvements which did not transgress this line. (See Constitution of United States, Revised and Annotated 1952 Senate Document No. 170 82nd Congress 2nd Session p. 895 for illustrations of this development.)

The only modes known to the common law to re-examine such facts as are properly tried by a jury are the granting of a new trial by the Court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings: *Parsons v. Bedford*, 3 Pet. 447, 7 L. Ed. 732.

Prior to the enactment of Rule of Civil Procedure 50, 28 U. S. C. A. federal courts did not have the right even where the evidence was insufficient as a matter of law to do anything more than grant a new trial. Rule 50(b) was adopted for the purpose of speeding litigation and preventing unnecessary retrials. It merely renders unnecessary a request for reservation of the question of law or a formal reservation and in addition it regulates the time and

manner of moving for direction and of moving for judgment on the basis of the refusal to direct. "It adds nothing of substance to rights of litigants heretofore existing through a more cumbersome procedure: *Montgomery Ward v. Duncan*, 311 U. S. 250; *Berry v. United States*, 312 U. S. 450. In the latter case (312 U. S. p. 453) this Court said:

> "But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact a jury being the constitutional tribunal provided for trying facts in courts of law."

A trial court may not now and has never had the right pursuant to the Constitution of the United States to *predetermine* an essential fact. An appellate court may not now and has never had the right to *redetermine* a fact properly submitted and found by the jury which is sustainable by the testimony *and substitute its own conclusion or finding of fact.* Such a procedure clearly denies the party a trial by jury guaranteed by the Seventh Amendment and violates the interdict of the last part of the amendment which requires that no fact be re-examined once found by a jury except in accordance with the common law: *U. S. v. Alfred Manuszak*, 234 F. 2d 421; *Bollenbach v. U. S.*, 326 U. S. 607, 66 S. Ct. 402, 90 L. Ed. 350; *Liberty Mutual Insurance Company v. Thompson*, 171 F. 2d 723 (C. C. A. 5th 1948); *Curtis v. A. Garcia Y Cia*, 272 F. 2d 235, 238 (C. C. A. 3rd 1959).

In our case, the Court of Appeals was wholly indifferent to the established basis upon which powers have been allocated between the court or jury and was beguiled into rejection of a view of the facts which seemed to it less reasonable than its own view, a violation of Petitioner's constitutional rights, which cannot be condoned.

In submitting the issues to the jury the District Court Judge under clear and proper instructions let the jury decide whether or not there was an unreasonable discharge

of this cargo, an unsafe method used in the discharge thereof and asked it to relate its findings to the special interrogatory No. 4 which asked it to state whether the fault of Ellerman arose out of any failure on the part of the Petitioner to do its work in accordance with the contractual obligations between it and the shipowner. The jury answered this latter interrogatory (187a, 189a) in the negative having first stated in response to interrogatories Nos. 1 and 2 respectively that unseaworthiness was a substantial factor in causing the injuries to the plaintiff and that negligence on the part of Ellerman was a substantial factor in causing injuries to the plaintiff (188a). Despite these clear factual findings the Court of Appeals found (289 F. 2d 201, 207): "Thus if it was negligence on Ellerman's part to permit Beard to work in an unsafe place, it was equally negligent for Atlantic to 'handle' the cargo in the unsafe place to work." The jury had made a completely contrary factual finding and even if its finding in the Court's view was erroneous under the facts, there being sufficient evidence to sustain its finding, the Court could not *substitute* its own finding in order to reverse.

It is submitted that to justify a reversal and a direction to find against Petitioner there would first have to be an insufficiency of testimony to support the specific finding of the jury or a basic error of law as to how its finding once made should be applied.

The Court of Appeals had itself noted the distinction between the jury's answer to interrogatory No. 2 (in which it held Ellerman negligent) and its answer to interrogatory No. 4 (in which Petitioner was absolved from liability over to Ellerman) by saying (289 F. 2d 201, 206):

> "In determining Interrogatory No. 2 the jury was determining *the issue of negligence* between Beard and Ellerman. In answering Interrogatory No. 4, the jury was determining, necessarily, the *contractual obligation* of Atlantic to Ellerman."

If indeed, as the court later suggests, the jury was *obliged as a matter of law* to find Petitioner negligent if it found Ellerman negligent, then the findings of the jury were inconsistent as the Appellant below argued, and since the findings were for the jury, the judgment against the shipowner should have been reversed and the case returned for a new trial.

The fact is however that while Ellerman was liable to Beard for negligence, the Petitioner was not liable to Beard for anything it did, so long as it met its absolute obligations to Beard under the Longshoremen's and Harbor Workers' Act (33 U. S. C. Sec. 901 et seq.).

Petitioner's contractual liability to Ellerman for indemnity involved a consideration of the terms of the contract: *Weyerhaeuser SS Co. v. Nacirema Co.*, 355 U. S. 563. The contract and its terms however were neither examined, reviewed nor construed by the Court of Appeals.

Disregarding completely its obligation to accept the jury's findings where sustainable by the evidence, as such findings related to the question of breach of the contract, the Court of Appeals merely equated the negligence of Ellerman as determined by its duty to Beard with the obligations owing by Petitioner to Ellerman solely by reason of the written contract, and held Petitioner liable to Ellerman for the *same* negligence which made Ellerman liable to Beard, the plaintiff.

The Court of Appeals points out that "the record affords ample basis for a jury fact finding that (1) use of the bale hook method in the discharge of burlap bales constituted negligence and (2) that the injured longshoreman was not afforded a safe place to work."

But despite the fact that the record afforded a basis for such findings, *these findings were not made as to the Petitioner*, although the charge of the court left to the jury "whether there was a sub-standard performance in which there was foreseeability that injury might occur to someone in the breach of that contract . . ."

The District Court specifically posed to the jury the questions (172a):

> "Did the Atlantic & Gulf Stevedores create the condition which made Ellerman Lines and the City Line responsible to the plaintiff? . . . Did they breach that contract to do it in a workmanlike manner with the *utmost* care? . . . In other words did the liability of the Ellerman Lines Limited and the City Line Limited arise out *of any* failure on the part of Atlantic & Gulf Stevedores to do its work in accordance with the contractual obligations?" (Emphasis supplied.)

The jury said "no" to all of these questions by its answer to interrogatory No. 4.

As was well stated by Mr. Justice Lamar in *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 417:

> "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. . . . *The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court.* . . . When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, *the determination of the matter is for the jury.* It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question is ever considered as one of law for the court." (Emphasis supplied.)

The courts are constantly urged in cases of this character to substitute their judgment for that of the jury on questions of fact. The seductive argument is made that a conclusion of fact which appears by the court to be reasonable is so clear that reasonable men could reach no other. If this sort of reasoning is allowed to prevail, however, it

means that the courts are substituting their judgment for that of the jury on fact questions in violation of constitutional requirements: *Burcham v. J. P. Stevens Co.*, 209 F. 2d 35.

Questions of negligence or contributory negligence are not to be decided by applying "rules of thumb" to the evidentiary facts and treating as conclusions of law what are in reality conclusions of fact: *Baltimore & Ohio R. R. Co. v. Griffith*, 159 U. S. 603, 611, 16 S. Ct. 105, 40 L. Ed. 274; *Texas & Pac. R. Co. v. Gentry*, 163 U. S. 353, 368, 16 S. Ct. 1104, 41 L. Ed. 186.

In *The Texas Company v. Gianfala*, 350 U. S. 879, 100 L. Ed. 775, the Court of Appeals had deliberately set aside the jury's verdict as to whether the plaintiff's decedent was a seaman and "member of the crew" under the Jones Act. This Court granted certiorari and without argument summarily reversed the judgment of the Court of Appeals, with directions to reinstate the judgment of the District Court for the plaintiff on the ground that the issue was exclusively for the jury. It is respectfully submitted that summary reversal is fully warranted in the instant case.

The question in the instant case, whether the Petitioner had complied with its contractual obligation that "*All the work shall be done with every care and due dispatch to the satisfaction of the party of the first part.* (shipowner)" (148a) was clearly a factual question for the jury.

Most recently in *Sentilles v. Inter-Carribean Shipping Corp.*, 361 U. S. 107, 4 L. Ed. (2) 142, 80 S. Ct. 173, Mr. Justice Brennan delivering the opinion of the Court in a case involving a factual determination by a jury under the Jones Act, stated that:

> "*The members of the jury, not the medical witnesses were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony into consideration.* . . . . The focal point of judicial review is the reasonableness of the particular refer-

> ence or conclusion drawn by the jury . . . The very essence of its (the jury's) function is to select from among conflicting references and conclusions that which it considers most reasonable . . . *Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different references or conclusions or because judges feel that other results are more reasonable.* Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 35, 88 L. Ed. 520, 525, 64 S. Ct. 409, 15 NCCA U. S. 647. See Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 1 L. Ed. (2) 493, 77 S. Ct. 443." (Emphasis supplied.)

In the instant case, the finding of negligence by the jury as to the defendant shipowner did not require *as a matter of law* a corrolary finding that the stevedore was also negligent. The facts in evidence justified a contrary finding and the Court of Appeals could not reverse it by suggesting that it was required as a matter of law.

In *Lavender v. Kurn*, 327 U. S. 645, 90 L. Ed. 916, 66 S. Ct. 740, this Court said:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where as here there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable:"

See also *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67; *Bailey v. Central Vermont R. Co.*, 319 U. S. 350, 353; *Blair v. Baltimore & Ohio R. R. Co.*, 323 U. S. 600, 89 L. Ed. 490.

Indeed in two cases dealing essentially with the issues involved in this case, the Court of Appeals for the Third

Circuit has met the issue in conformity with the requirements of the Seventh Amendment. Most recently in *Hodgson v. Lloyd Brasileiro Patrimonio Nacional* (decided July 6, 1961 by Circuit Judges Kalodner, Staley and Hastie (two of whom were members of the court which decided our case)) the jury in answer to a special interrogatory, found that the shipowner was not guilty of negligence but based upon a finding of unseaworthiness, made an award in favor of Hodgson against it. The shipowner argued on appeal that judgment rendered against it in the third party proceedings for indemnity, must be reversed as a matter of law despite a jury finding that the stevedoring company had performed its services in a "workmanlike, safe and proper manner". The Court of Appeals said:

> "The shipowner forgets that an appellate court will not interfere with a judgment entered on a verdict returned by a jury simply because of its opinion as to the weight or preponderance of the evidence. Liberty Mutual Insurance Co. v. Thompson, 171 F. (2d) 723 (C. A. 5 1948); Harnick v. Lilley, 167 F. (2d) 159 (C. A. 8 1948); 5 Moore's Federal Practice Sec. 38.08 (5 p. 89)."

In the latter decision the Court referred to its own decision in *Hagans v. Farrell Lines, Inc.*, 237 F. 2d 477 (1956) where, in an opinion written by Judge Kalodner, the court felt bound by the jury's finding and specifically referred to *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563, saying:

> "Whether the stevedoring company's conduct constituted a breach of the provision (of the agreement) was, of course, a question of fact for the jury. Weyerhaeuser S. S. Co. v. Nacirema Operating Co., supra."

In the instant case there was ample evidence to support the jury's verdict. All of the witnesses were unanimous in their testimony that Atlantic's methods were the

only methods they had seen used in discharging such cargo (82b, 83b); they had never seen bands break during a vertical lift (7b, 14b, 38b). The method is approved by the Safety Rules of the Philadelphia Marine Trade Association.

The four experts all agreed that the methods and procedures used by Atlantic were more safe and efficient than any other possible method (see Footnote 1, p. 6). No evidence was offered to show that Petitioner, even if charged with the duty could have done anything to correct the condition created by the New York cargo.

The jury was thus justified in finding that the fault of the shipowner did not "arise out of any failure on the part of Atlantic and Gulf Stevedores, Inc., to do its work in accordance with the contractual obligation" (188a).

The Appellate Court must resolve all conflicts in the evidence in favor of the party against whom the judgment is sought and reject any evidence to the contrary. *Downing v. Union Paving Co.*, 184 F. 2d 481 (C. C. A. 3rd 1949); *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29 (1944), rehearing denied 321 U. S. 802; *Sentilles v. Inter Caribbean Shipping Corp.*, 80 S. Ct. 173, 361 U. S. 107 (1959).

The specific holdings in *Hagens* and *Hodgson*, referred to above, make the action of the Court of Appeals in this case the more startling. There is no explanation for the court's lapse in denying Petitioner its constitutional rights in our case and it cannot be justified. That the decision clearly violates the provisions of the Seventh Amendment relating to review on appeal is beyond question. There is no doubt that the application of the standard of appellate review expressed by this Honorable Court in *McAllister v. United States*, 348 U. S. 19, 99 L. Ed. 20, 75 S. Ct. 6 has been disregarded by the Court of Appeals. In the *McAllister* case the court said (U. S. PP. 20-21, L. Ed. p. 24):

> "In relation to the District Court's findings we stand in review in the same position as the Court of

Appeals. The question therefore, is whether the findings of the District Court are *clearly erroneous.*" (Emphasis supplied.)

Applying this standard to the present case the Court of Appeals could reverse the judgment in favor of Atlantic only if the jury's findings were clearly erroneous. The record demonstrates that the findings of the jury were *not* "clearly erroneous" and the Court of Appeals erred in reversing them in violation of the provisions of the Seventh Amendment. Upon this ground alone, certiorari should be granted and the decision of the court below reversed.

Second Point: The Decision of the Court Below Is in Conflict With the Rule Laid Down in the Decisions of the Supreme Court in American Stevedores, Inc. v. Porello, 330 U. S. 446, 91 L. Ed. 1011, 67 S. Ct. 847, and Weyerhaeuser Steamship Co. v. Nacirema, 355 U. S. 563, 2 L. Ed. 491, 73 S. Ct. 438 (1958) Which Hold That in the Presence of a Written Contract All Fact Issues Involved in the Third Party Action, Including the Intention of the Parties to Such Writing, the Extent, Scope and Application of the Contractual Obligations Between the Shipowner and Stevedore, and Whether They Were Breached Are Issues to Be Decided by the Jury.

The decision of the Court below in the instant case is directly in conflict with the decisions of this Court in *American Stevedores, Inc. v. Porello,* 330 U. S. 446, 91 L. Ed. 1011, 67 S. Ct. 847 and *Weyerhaeuser Steamship Co. v. Nacirema,* 355 U. S. 563, 2 L. Ed. 2d 491, 78 S. Ct. 438 (1958).

There has been a considerable disagreement among other Courts about this Court's holdings in *Seas Shipping Co. v. Sieracki,* 328 U. S. 85, 90 L. Ed. 1099, 66 S. Ct. 872;

Halcyon Lines v. Haenn Shipceiling & Refitting Corp., 342 U. S. 282, 96 L. Ed. 318, 72 S. Ct. 277; ***Pope & Talbot, Inc. v. Hawn***, 346 U. S. 406, 98 L. Ed. 143, 74 S. Ct. 202; ***Ryan Stevedoring Co. v. Pan Atlantic S. S. Corp.***, 350 U. S. 141; ***Weyerhaeuser Steamship Co. v. Nacirema Steamship Co.***, 355 U. S. 563 (1958); and ***Crumady v. Joachim Hendrik Fisser***, 358 U. S. 423.

The active area of litigation involving suits for indemnity and so-called "contribution" by vessel owners against independent stevedoring contractors set the stage for this group of decisions by this Court extending the warranty of seaworthiness to a class of workers which had consistently been regarded as strangers to the rigors inherent in the work of those who went down to the sea in ships. Thus in 1946, in *Seas Shipping Company v. Sieracki*, (*supra*) the Supreme Court of the United States initiated this unprecedented course by holding that longshoremen were entitled to the warranty of seaworthiness. In *Halcyon Lines v. Haenn Shipceiling & Refitting Corp.*, (*supra*) (1952) this Court determined that the vessel could not seek contribution from an independent stevedoring contractor as an avenue to insulate its new and judicially acquired exposure. In *Pope & Talbot, Inc. v. Hawn*, (*supra*) (1953) this Court further extended the warranty of seaworthiness to cover a carpenter who was temporarily working aboard ship.

In 1956, this Court developed relief for the vessel by way of indemnity in the landmark decision of *Ryan Stevedoring Company v. Pan Atlantic Steamship Corp.*, (*supra*) wherein this Court held that the provisions of Section 5 of the Longshoremen's and Harborworkers' Compensation Act, 33 U. S. C. 905, did not act as a bar to the shipowner's asserted right to recover indemnity. The rationale behind the Court's holding on this point can best be summarized in these words from the opinion:

> "While the compensation act protects a stevedoring contractor from actions brought against it by its em-

ployee on account of the contractor's tortious conduct causing injury to the employee the contractor had no logical ground for relief from the full consequences of its *independent contractual obligation, voluntarily assumed to the shipowner to load the cargo properly. . . .*"

". . . The shipowners action here is not founded upon a tort or upon any duty which the stevedoring contractor owes to its employees. *The Third-Party Complaint is grounded upon the contractor's breach of its purely consensual obligation owing to the shipowner to stow the cargo in a reasonably safe manner.* Accordingly, the shipowner's action for indemnity on that basis is not barred by the compensation act". (Emphasis supplied.) (350 U. S. 131, 100 L. Ed. 140, 76 S. Ct. 239.)

The Court then reached the second question which it viewed as whether, *in the absence of an express agreement of indemnity* (there being no formal written contract) a stevedoring contractor was obligated to reimburse a shipowner *for damage caused by the contractor's improper stowage of the cargo.* The Court clearly indicated that the decision would be based on contractual principles and expressly refused to meet the question on common law indemnity principles:

"Because respondent in the instant case relies entirely upon Petitioners contractual obligation, we do not meet the question of a non-contractual right of indemnity or of the relation of the Compensation Act to such a right."

The Court reasoned that Ryan having agreed to perform *all* of the shipowner's stevedoring operations at the time and place where the cargo in question was loaded, of necessity agreed to stow the cargo properly and safely and

that failure to do so was in effect a violation of the very essence of the stevedoring contract. The Court stated that the stevedore owed to the shipowners a *"warranty of workmanlike service"* which the Court compared to a manufacturer's warranty of soundness of its manufactured product. The Court rejected the theory that the shipowner's duty to supervise the stowage and right to reject unsafe stowage, would preclude it from recovering indemnity. There is nothing in the opinion of any Court considering the *Ryan* case to indicate that it was ever urged or proved that the vessel had *actual knowledge* of the condition resulting in injury to the longshoreman. Instead the Courts considering the *Ryan* case viewed the fault of the vessel as arising from the fact that the vessel *failed to discover and should have known of the improper stowage. Clearly in Ryan the vessel owner had no actual knowledge of the defects and its failure was merely one to inspect and discover the defect.*

This Court again considered the indemnity question in *Weyerhaeuser Steamship Company v. Nacirema Operating Company, Inc.*, (*supra*). In that case, a winch shelter built in New York by the stevedore was permitted to remain while the ship proceeded to and arrived at Boston. There, the shelter was not inspected by either the stevedore or the ship's crew until the injury which occurred some five days after the arrival of the vessel in Boston. The case was tried to a jury with the judge *reserving submission* of the third-party action until he received the verdict on the main suit. The jury was charged as to both seaworthiness and negligence and returned a verdict in favor of the Plaintiff on the negligence cause of action *and in favor of* the vessel on the unseaworthiness count (236 F. 2d 849). After receiving the verdict for the Plaintiff in the main case, *the trial court directed a verdict in favor of the stevedoring contractor against the vessel on the indemnity action.* The Court of Appeals affirmed the directed verdict. The Supreme Court of the United States in a unanimous opinion

reversed the Second Circuit and remanded the case for a new trial, holding that it was error for the trial court to direct a verdict in favor of the steyedore *and that the issues relating to indemnity should have been submitted to the jury.* The Court goes on to enunciate a principle, without clarification, that may well be the critical factor in indemnity actions (355 U. S. 567, 2 L. Ed. 2d 494, 78 S. Ct. 442):

> "If in that regard respondent rendered a substandard performance which lead to foreseeable liability of petitioner (the vessel) the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*" (Emphasis added.)

The Court gave no indication of just what conduct on the part of the vessel would be necessary to preclude recovery of indemnity against the stevedore, but indicated clearly that the test of liability in the indemnity action rests on *different* principles than the liability of the vessel to the Plaintiff in the main case. It reiterated in a footnote (2 L. Ed. 2d 282) the admonition of the *Ryan* case that (350 U. S. at 134): "the shipowner's action is not changed from one for a breach of contract to one for tort simply because recovery may turn upon the standard of performance of petitioner's stevedoring service", and stated (355 U. S. 567-568, 2 L. Ed. 2d 494-495, 78 S. Ct. 442, 443):

> "The evidence bearing on these issues (the indemnity issues)—Petitioner's action in making the shelter on its ship available to respondent's employees in Boston, although it apparently was unsafe, as well as respondent's continued use of the shelter for five days thereafter without inspection—was for jury consideration under appropriate instructions. These issues were not encompassed by the instructions in the main case, where the test of Petitioner's liability was based on failure to perform a non-delegable duty to Connolley. Since the liability of respondent depended on different

principles, Crawford v. Pope & Talbot, Inc., (C. A. 3 Pa.) 206 F. 2d 784, 792, all fact issues involved in the third-party action should have been submitted to the jury after the verdict in the main case."

Recognizing that the jury verdict in the main case might have been predicated on one of at least three different grounds the Court concluded that at least one of these reasons, i.e., the failure on the part of the vessel during the five days in Boston to inspect the shelter and to detect and correct the unsafe condition would not preclude a recovery of indemnity by the vessel.

On February 24, 1959, this Court decided *Crumady v. Fisser*, (*supra*). The accident occurred there while cargo was being removed from cargo hatches by means of the ship's cargo gear. While raising a draft of cargo a topping-lift parted, permitting a cargo boom and its attachments to fall into the hatch, striking and injuring the Plaintiff. The safe working load of the boom and topping-lift at the time of the accident was three tons. A shut-off device on the boom had been set at six tons by employees of the ship before being turned over to the longshoreman. The trial court held the vessel unseaworthy and liable to the injured longshoreman. The trial court found that the stevedores had shifted the boom in an effort to gain more clearance between the cargo and sides of the hatch, creating a load in excess of the safe working load. It held the stevedoring contractor liable for indemnity (142 F. Supp. 389) because it was negligent in bringing into play the unseaworthy condition of the vessel and that such negligence was the sole cause of the injury.

The Court of Appeals for the Third Circuit reversed on the basis that the vessel was not unseaworthy and that the sole cause of the injury was the negligence of the stevedoring contractor. This Court reversed the Third Circuit, and held that the shipowner was not relieved of his duty to supply a seaworthy vessel by turning control of the loading or unloading of the ship over to the stevedoring con-

pany. The Court based its opinion on the fact that the shut-off device was adjusted by the ship's crew so as to make it unsafe and dangerous for the work at hand. This Court, however, felt that the shipowner was entitled to indemnity under the principle announced in the *Ryan* and *Weyerhaeuser* cases. The Court concluded the District Court's finding that *the negligence of the stevedoring contractor* brought the unseaworthiness of the vessel into play and amounted to a breach of warranty of workmanlike service, was not clearly erroneous.

The *Crumady* case still did not undertake a definitive statement of the "conduct on the part of the shipowner" which will bar indemnity. It merely indicated that furnishing defective equipment will not necessarily have that effect.

Thus Courts attempting to apply *Weyerhaeuser* and *Crumady* have real difficulty in determining what conduct of the shipowner will bar indemnity *and are relegated to making comparisons to the actions of the owners in Crumady and Weyerhaeuser resulting in abstract and conjectural conclusions:* See *Calmar Steamship Co. v. Nacirema Operating Co.*, (4th Cir.) (1959), 266 F. 2d 79, 80, 81; *American Export Lines v. Revel*, (4th Cir.) (1959) 266 F. 2d 82.

In the latter case the Court said: "We do not attempt to explore what conduct, in other circumstances, would be 'sufficient to preclude recovery'. We merely hold that under the decisions of the Supreme Court the limits are not transcended here."

What are the limits? What is the conduct which will bar recovery by way of indemnity? Will any conduct of shipowner bar recovery in the case of the existence of a contract of indemnity? These questions remain unanswered by this Court, because their determination are matters of fact in each case, which *Weyerhaeuser* and *Porello* clearly hold should be submitted to a jury, and are not a matter of law as the Court of Appeals erroneously held in the instant case. It is only where a jury or the fact-finder, as in

Crumady, find negligence of the stevedore amounting to a breach of contract that a court can say that the obligation to indemnify as a matter of law exists.

In *Waterman S. S. Corp. v. Dugan & McNamara*, 5 L. Ed. 2d 169 (1960) the stevedore alleged as an affirmative defense that there had been no direct contractual relationship between it and the petitioner covering the stevedoring services. This Court held that although *Ryan* and *Weyerhaeuser* placed considerable emphasis on the direct contractual relationship between the shipowner and the stevedore, *Crumady* made it clear that the stevedore's assumption of responsibility for the shipowner's damages resulting from unsafe and improper *performance* of the stevedoring services, was unaffected by the fact that contractual privity was lacking and that merely going aboard a vessel to perform stevedoring services was enough to bring the vessel into the zone of modern law that recognizes rights in third-party beneficiaries.

Certiorari was granted in the *Waterman* case "to consider whether in a situation such as this the *absence* of a contractual relationship between the parties is fatal to the indemnity claim" (5 L. Ed. 2d 171).

Certiorari should be granted in the instant case to consider whether in the *presence* of a written contract between shipowner and stevedore containing limited provisions for indemnity and expressly limiting the performance of the stevedore to fixed written standards and obligations which a jury expressly found were performed, a Court may nevertheless impose the burden of indemnity solely on an implied warranty of workmanlike service referred to in *Ryan, despite a well-founded specific finding of fact that no act of the stevedore was in breach of the written contract between the parties.*

This specific question has never been considered by the Supreme Court of the United States.

Of all the cases heretofore referred to however only *Weyerhaeuser*, (*supra*) and *American Stevedores v. Porello*,

(*supra*) in the Supreme Court dealt with *the manner in which a specific written contract* relating to the indemnity obligation should be considered by the Court. In each of these cases the specific factual issue here involved was not encountered. But it is significant that in each case the Court held that the extent of the indemnity obligation assumed by the contract, when raised, and whether it applied to the specific facts leading to injury, when raised, were issues of fact and that all fact issues should have been submitted to the jury (2 L. Ed. 2d 494).

The *Porello* case was more analytical than the *Weyerhaeuser* case. Faced with a specific written contractual provision relating to indemnity, which at first reading appears to be clear, it nevertheless held that the clause was ambiguous and required evidence to be taken as to the intention of the parties so that the issue could be resolved *as a question of fact* and said:

> "On this record we cannot answer the contention of either party. As it stands the clause is ambiguous. Evidence might well have been taken as to the intention of the parties, but was not. It may be that the parties only meant American to indemnify the United States should the Government be held liable for damages solely caused by American's negligence. It may be that American should fully reimburse the United States for all damages caused in any part by American's negligence. Finally, the parties may have intended that American, in case of the joint negligence of the parties, should be responsible for that proportion of the damages which its fault bore to the total fault. . . . From the record it is not clear whether the District Court made any finding as to the meaning of the contract. We believe its interpretation should be left in the first instance to that Court, which shall have the benefit of such evidence as there is upon the intention of the parties. If the District Court inter-

prets the contract not to apply to the facts of this case, the Court would, of course, be free to adjudge the responsibility of the parties to the contract under applicable rules of admiralty law."

The case was remanded for determination of the meaning of the contract.

Contrary to the requirement of these two cases that the terms of the contract be adverted to and the intention ascertained, the Court of Appeals in the instant case wholly disregarded the terms of the contract and the fact that there was a writing in which the parties had solemnly fixed their rights. It relied instead on the implied contract theory of *Ryan*, *Crumady* and *Waterman* in which there were either admittedly no written contracts relating to indemnity involved or the specific terms of the contract were not adverted to or considered by this Court and although in each of those cases there was a specific factual finding of negligence amounting to a breach of the warranty of workmanlike service. The Court of Appeals in the instant case also relied upon *American President Lines v. Marine Terminal Corp.*, 334 F. 2d 753, but in that case the specific terms of the contract were adverted to and considered and they were found as a fact to have been breached by the jury.

In the *Porello* case this Court held that the interpretation of the indemnity provision of the contract[2] was to be left in the first instance to trier of the facts having the benefit of whatever evidence existed as to the intention of the parties. There being no evidence as to the intention of the parties in the record, the Court reversed the award of indemnity and remanded the case to the District Court

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2. "The stevedore performing any service under this schedule shall be responsible for any and all damages or injury to persons and cargo while loading or otherwise handling or stowing the same, to any ship including its apparel and equipment, cars, and car-floats used in connection therewith, through the negligence or fault of the stevedore, his employees and servants."

for a determination of the meaning of the contract. This action stressed the care with which the intention of the parties as expressed in their contract must be analyzed. In the *Weyerhaeuser* case, *supra*, the action of the trial Court in *directing* a verdict in favor of the stevedore contractor was held to be improper. The evidence as to whether the stevedore rendered a substandard performance of its contractual obligation was held to be for the jury's consideration under appropriate instructions. Such a procedure was imperative since the exact basis upon which the shipowner's negligence was found by the jury was uncertain. Whether the right to indemnity exists would most naturally be determined by the jury, which, in the first instance knew precisely upon which of several theories the shipowner's liability was grounded. As in *Weyerhaeuser* where at least three possible bases of liability were apparent and one at least would not preclude indemnity, the jury determination would thus decide whether the theory applied by it warranted a finding of a breach of contract and whether indemnity would follow.

The Court of Appeals Reversed the Findings of the Jury and the Judgment Entered Thereon Upon the Erroneous Conclusion That the Trial Judge Failed to Submit to the Jury the Question of Unsafe Place to Work in Determining Whether Petitioner Breached Its Contractual Obligation.

The Court of Appeals in the instant case disregards the mandate of *Porello* and *Weyerhaeuser*. It gives no consideration and makes no reference to the contract between the parties and ignores the fact that the jury's finding specifically exculpated petitioner of any breach of its contractual obligation, or of any negligence in "handling" cargo in an unsafe place after fully considering the con-

tract under a full and appropriate charge of the trial judge (171a, 172a, 173a Appellant's Appendix).[3]

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3. I must so instruct you because I have to go to the second cause of action, which is the action by Ellerman Company against Atlantic & Gulf Stevedores. This action arises out of contract. Ellerman Lines *had a contract with the Atlantic & Gulf Stevedores, and that contract is before you, and you will read it and see just what the Atlantic & Gulf Stevedores contracted to do.*

Under one portion of that contract they were supposed to unload and discharge this cargo of burlap with the utmost care. *There are other portions of the contract that you may advert to; the whole contract is in evidence.* In this action by Ellerman Lines and The City Line against Atlantic & Gulf Stevedores whom the defendants brought in, the focal point of your inquiry is *whether there was any breach of that contract,* whether there was a substandard performance in which there was foreseeability that injury might occur to someone in the breach of that contract, and while there is a tort measurement of that standard it nevertheless is still a contract action, and the third-party defendant, Atlantic & Gulf Stevedores, are only responsible for the breach of that contract.

Ellerman Steamship Company says to you that if there is any liability which we owe to Mr. Beard that condition was created by Atlantic & Gulf Stevedores. That is your criterion: *Did the Atlantic & Gulf Stevedores create the condition which made Ellerman Lines and The City Line responsible to the Plaintiff? There again you have to run the whole gamut of facts in the case.* You will have to decide whether or not there was an unreasonable discharge of this cargo, an unsafe method used in the discharge of this cargo, in the placing of the hook. *Did they breach that contract to do it in a workmanlike manner with the utmost care?* The steamship company says, "Yes, they did. They breached *that contract.* They did not do it in a workmanlike manner. All the evidence here points to the fact that they did not do it with the utmost care, and therefore they caused the condition which created the liability which is ours, which the plaintiff has secured against us as defendants."

In other words, did the liability of the Ellerman Lines, Limited, and *The City Line, Limited, arise out of any failure on the part of Atlantic & Gulf Stevedores to do its work in accordance with the contractual obligations?* If you answer that yes, then your next inquiry is: Was the breach of this contract by Atlantic & Gulf Stevedores a substantial factor in bringing about the injuries to the plaintiff?

. . . If you find that Atlantic & Gulf Stevedores did breach *their contract* with the defendant, and that they were the contributing cause of the liability which they incurred to the plaintiff then you should render a verdict in the amount, same amount, which you rendered against the defendant, and you should render that against the third-party defendant, Atlantic & Gulf Stevedores." (Emphasis added.)

It is evident from the quotation of the charge on this point, that although the shipowner had presented no evidence on any other point except the use of the bale hooks, the District Court told the jury that the *whole* contract should be adverted to, and left to them whether there was *ANY* breach of that contract. He left to them whether there was a substandard performance of *any part of the contract* and whether the liability of the shipowner arose "out of *ANY* failure on the part of" Petitioner.

Thus it is evident that the Trial Judge specifically followed the mandate of this Court in the *Porello* and *Weyerhaeuser* cases whereas the action of the Court of Appeals was in direct conflict with the rules of law enunciated in these cases.

Relating the special verdict of the jury to the contract here involved, it is obvious that the injuries were not caused by any failure or negligence of the Petitioner or any act constituting a breach of contract.

The Court of Appeals Erroneously Reversed the Findings of the Jury and the Judgment Entered Thereon in Total Disregard of the Evidence in Support of the Verdict Without Reference to the Terms of the Express Written Contract Between the Parties and Seizing Upon a Suggestion by Counsel for Petitioner, That the Jury Could Have Found Negligence of the Shipowner on the Basis of Improper Stowage Assumed That the Jury in Fact So Found, Totally Disregarding That Other Independent Grounds of Negligence of Shipowner of Which the Jury Acquitted Petitioner, Were Equally Supported by the Evidence.

The ship's failure to examine the bands of the bales at the time of stowage in India; the improper stowage of the two consignments; the failure to discharge the New York consignment before the arrival of the vessel in Philadelphia

and the "unseaworthiness of the vessel", created by these failures and conditions, were all facts and conditions in existence before the initial application of the contract to the particular job here involved. The jury's special verdict holding the shipowner negligent could, as in *Weyerhaeuser*, have been predicated as to negligence on any one of these factual grounds, all existing prior to and in the absence of any act or conduct of the Petitioner, and which would "prevent recovery" of indemnity in the third-party action. (*Weyerhaeuser*, 355 U. S. p. 568.)[4]

To hold that a stevedore may be liable as an indemnitor for the liability of a shipowner caused by the shipowner's negligence and conditions committed and existing at the time of the application of the contract and merely for working under such conditions or for the interaction of such conditions, equipment or stowage which the Petitioner did not control and had no duty to supply, repair, correct or control, is to make of the stevedore an absolute guarantor and to create a contractual indemnity far beyond the compass of the agreement actually made and here involved: *Smith v. Pan Atlantic Steamship Corporation*, 161 F. Supp. 422 (E. D. Pa. 1957) aff'd per curiam, 254 F. 2d 600 (3rd

4. The Circuit Court seized upon a suggestion, of counsel for petitioner, in its brief, that the jury *could* have found negligence of the shipowner on the basis of improper stowage of the New York cargo and assumed that the jury had in fact so found, totally disregarding that its finding (Interrogatory 2) that shipowner was negligent could have been made upon other independent grounds of negligence equally well supported by the evidence. On this *speculative* suggestion, made only as part of the argument, as being within the realm of possibility, the Court below predicates its holding, treating it as an established fact. Forced to recognize that it was only *speculative* however the Court below evidences the utter weakness of the assumption when it says (289 F. 2d 201, 207): ". . . and thus *if* it was negligence on Ellerman's part to permit Beard to work in an unsafe place, it was equally negligent for Atlantic, to "handle" the cargo in the unsafe place to work." (Emphasis supplied.)

The fact is that the answer to Interrogatory No. 2 was justified for any one of several reasons supported by the evidence other than the one "suggested" by the Petitioner's counsel and such other grounds did not involve the Petitioner at all.

Cir. 1958), which held that under such circumstances the stevedore was performing, not breaching, the contract.

Under the facts presented by the evidence, nothing short of a contract agreeing to hold the shipowner harmless or indemnifying the shipowner against its own independent negligence and expressly accepting liability to Petitioner's employees caused by the shipowner's acts in creating or causing an unseaworthy condition, in whole or in part, could be held to impose such absolute liability on the stevedore—No Such Contract Existed.

The effect of the decision of the Court of Appeals is to create such absolute liability on the part of the stevedore who enters into *any* indemnity agreement no matter how carefully the language of the agreement is written to limit such indemnity. Since a stevedore is generally deemed to be an "expert" the conclusions reached by the Court of Appeals in this case, if allowed to prevail as the applicable law, would require every Court to hold that the "expertise" of the stevedore is in itself a sufficient substitute for a specific and clear agreement to be liable as an indemnitor. This is directly contrary to the holding of *Porello* and *Weyerhaeuser*.

A contract for indemnity against the consequences of one's own negligence must be clear and definite in its provisions: *Chicago R. I. & P. R. Co. v. Williams*, 245 F. 2d 397. The language employed must clearly and definitely show an intention to indemnify against a certain loss or liability; otherwise it is not a contract of indemnity: 42 C. J. S. Indemnity Section 5; *Frankel v. Johns Manville Corp.*, 257 F. 2d 508; *Thompson-Starrett Co. v. Otis Elevator Co.*, 271 N. Y. 36, 2 N. E. 35, 36. In the latter two cases the indemnitees were found to be negligent, while the indemnitor, as in our case, was found not to be negligent. The Court, in each case, pointed out the necessity for unequivocal language, if one is to be indemnified against his own negligence and denied recovery to the indemnitee: Cf. *Salamy v. New York Central System*, 146 N. Y. S. 2d, 814.

An agreement by a stevedore to indemnify a party for liability for personal injuries must express an intention to throw loss upon the indemnitor beyond peradventure of a doubt: *Pierce v. Erie R. Co.*, 165 F. Supp. 216, aff'd 264 F. 2d 136.

The recognition of this distinction between an express and an implied contract is well established and, where an express contract exists, the law will not imply a different agreement: *Martin v. City of Port Huron*, 111 F. 2d 759 (C. C. A. 6th 1940); *Haver v. Bond Stores*, 178 F. 2d 836 (C. C. A. 6th 1950); *Ferroline Corp. v. General Analine & Film Corp.*, 107 F. Supp. 326, affirmed 207 F. 2d 912, cert. denied 74 S. Ct. 678, 347 U. S. 953, rehearing denied 74 S. Ct. 748, 347 U. S. 979.

It is not believed that this Court intended in the *Ryan* case, or any case involving similar issues since that time, to undermine the Longshoremen's Act or to announce as an absolute principle of law that, without regard to whether a stevedoring company intends to agree to indemnify or agrees to indemnity only in the event of certain contingencies involving its own negligence, it has nevertheless agreed to absolute liability for such indemnity merely because it agrees to do a job. We submit *Weyerhaeuser* makes it clear that this was not this Court's intention in *Ryan*. On the contrary *Weyerhaeuser* makes it clear that in the *presence* of a written contract, the terms of the writing must be considered and will control.

The Court of Appeals in the instant case held instead that the contractual obligation of the stevedore was to be equated with the duty of the shipowner to the Plaintiff. Hence, solely on the fact that the shipowner was found to be negligent it concluded that the stevedore had to be negligent, despite the jury's special verdict to the contrary.

The effect of the holding of the Court of Appeals is to thwart entirely the import of the limited liability of a stevedore which the Longshoremen's Act was deliberately designed to afford except where the stevedore specifically and

voluntarily assumes burdens beyond the Act by contract. There is no evidence in this case to support the conclusion of the Court below that the Petitioner voluntarily agreed to give up the limited liability which the Longshoremen's Act afforded. It agreed contractually and in writing merely to do its work "with every care and due dispatch to the satisfaction of" the shipowner (148a, Appellant's Appendix). (Since there was no damage to cargo the agreement to pay for damage to cargo if "caused through rough handling and/or theft or pilferage by the stevedore's men during the time of stevedoring operations" is not applicable here (152a, Appellant's Appendix)). *There are no other words or language* in the agreement relating to indemnity. The absence of such words in the presence of a written contract setting forth in detail the rights, duties, and obligations of the parties must be held to mean that no voluntary burden of indemnity was assumed or accepted. Since the shipowner wrote the contract and found no difficulties in clearly imposing an obligation of indemnity in the case of damage to cargo it must be assumed that if he had wanted indemnity as to other losses or injuries he could have so stated in clear, unambiguous and unmistakable terms.

The decision of the Court of Appeals is contrary to law generally and in direct conflict with *Porello* and *Weyerhaeuser*.

Third Point: The Conflict Between the Court Below and the Courts of Appeal for the Second, Fourth and Ninth Circuits, and Between Divisions of the Third Circuit and the Conflict Between Decisions Within Each of These Circuits.

The decision of the Court below in the instant case is directly in conflict with the decision of the Ninth Circuit in *United States v. Harrison*, 245 F. 2d 911 (9th Cir. 1957); *Amerocean Steamship Co. v. Copp*, 245 F. 2d 291 (9th Cir.

1957), which are themselves inconsistent with *American President Lines Ltd. v. Marine Terminal Corp.*, 236 F. 2d 753 (9th Cir. 1956) and *United States v. Rothschild International Stevedoring Co.*, 183 F. 2d 181 (9th Cir. 1950). The decision in the instant case is likewise in conflict with the decision in the Second Circuit of *Reddick v. McAllister Lighterage Line*, 258 F. 2d 297 (2nd Cir. 1958); certiorari denied 358 U. S. 908, 3 L. Ed. 2d 229, 79 S. Ct. 235, which in itself is in conflict with *Booth Steamship Company v. Meier and Oelhaf Company*, 262 F. 2d 310 (2nd Cir. 1958) and the decisions of the Fourth Circuit in *Calmar Steamship Corporation v. Nacerima Operating Company*, 266 F. 2d 79 (4th Cir. 1959), and *American Export Lines, Inc. v. Revel*, 266 F. 2d 82 (4th Cir. 1959). The instant decision of the Court below is also in conflict with the decisions of the Third Circuit in *Hagans v. Farrell Lines*, 237 F. 2d 477; and *Hodgson v. Lloyd Brasilero Patrimonio Nacional*, decided July 6, 1961.

In the *Harrison* case (*supra*) the Court held that, even where an express indemnification contract exists, recovery over against the stevedore may be denied if the negligence of shipowner is by far the major factor in causing the injury, so that it would be against public policy to shift such a loss to the stevedore. The trial court held the United States liable to the injured stevedore but dismissed the Third-Party Complaint because the stevedoring company was not negligent and the Ninth Circuit affirmed by a divided Court. The majority concluded that a shipowner cannot by contract shift to the stevedore the duty to keep the ship seaworthy.

Referring to *Sieracki* (328 U. S. 85, 100), the Court of Appeals found that the obligation was directly against the shipowner and concluded that the ship and its owner could not be relieved of the continuous duty of keeping her seaworthy especially where the unseaworthiness was not caused by the stevedore. It held that liability of the stevedore could not be read into the indemnity agreement because he

did not risk breach of his contract by refusing to unload in the face of an open and notorious condition for which the officers of the ship and crew were entirely responsible. It refused to place a premium upon unseaworthiness of the ship and negligence by her crew and officers, saying that to do so would reverse "the maritime policy of ages which has even firmer foundations under modern conditions" (245 F. 2d 911, 915).

In the *Copp* case (*supra*) the Ninth Circuit denied indemnity on the basis that both the vessel and the stevedore were joint tort feasors, concurrently, continuously, and actively negligent, and that such negligence on the part of both was the proximate cause of the Plaintiff's injury.

In short, the Court held that the shipowner can recover by way of indemnity only where the stevedore is negligent and the breach of duty is the sole proximate cause of injury and the ship is unseaworthy but not where both are negligent.

In *Copp*, the Ninth Circuit did not even mention the somewhat inconsistent implication of *American President Lines v. Marine Terminal Corp.*, (*supra*) which was decided by a different panel of the same Circuit only nine months earlier. In the latter case the shipowner sought to recover over against the stevedoring contractor the sum paid in settlement to a longshoreman, employed by the stevedore. The injury was caused by the absence of a lock on some beams in the ship. The shipowner notified the stevedore of this condition and requested that it be repaired. The contract specifically required the removal of such beams. The unloading operation was then continued under the unsafe condition which was known by both the shipowner and the stevedore. The shipowner first tried to establish its claim to indemnity under the authority of *States Steamship Co. v. Rothschild International Stevedoring Co.*, 205 F. 2d 253 (9th Cir. 1953) and *Bentz v. Compania De Navigacion*, 213 F. 2d 397 (2nd Cir. 1954) on the ground that its liability to the longshoreman arose only from unseaworthiness while

the stevedore was negligent. The Ninth Circuit rejected that theory since the evidence showed the shipowner was itself negligent. However, the Court granted indemnity to the shipowner under the authority of the *Ryan* case reasoning that the stevedore breached its implied contractual duty to perform in a safe and workmanlike manner by failing to remove the beam, continuing the work under known hazardous conditions, *and in violation of the express terms of the contract.*

In *United States v. Rothschild*, (*supra*) the Ninth Circuit in a factual situation strikingly parallel to that considered by the Third Circuit in the *Hagans* case allowed indemnity on a tort theory holding that the stevedore was actively negligent in permitting the Plaintiff to continue work when the stevedore had knowledge of a defective winch. It held the passive negligence of the vessel in supplying the defective winch did not preclude the recovery of indemnity. Since the Supreme Court in the *Ryan* case did not pass on the question of a non-contractual right of indemnity this case still stands as authority for the recovery of indemnity on a non-contractual basis.

In *Reddick v. McAllister Lines Ltd.*, (*supra*) a longshoreman was injured when he fell from a defective wooden crate on a ship during unloading operations. The trial court held the ship unseaworthy, found the longshoreman had not been furnished with a safe place to work because of the defective crate, but allowed indemnity on the basis that the stevedore was negligent in stowing the crates too closely. The Second Circuit reversed and denied indemnity on the theory that the injury was caused by the defective crate and that the stevedoring company's breach of warranty in loading the cargo improperly was not a cause of the injury. Recognising that in *Ryan* and *Weyerhaeuser* this Court held the application of tort theories of liability, i.e., "active" or "passive" and "primary" or "secondary" negligence inappropriate, the Court of Appeals held, nevertheless, that under the general test of foreseeability applied

to contractual liability, the breach must be the cause of the injury to impose liability on the stevedore.

The decision of the Second Circuit in the case of *Booth Steamship Co. v. Meier and Oelhaf Co.*, (*supra*) involved an indemnity suit by the vessel against a contractor hired to repair the vessel's engines. An employee of the contractor incurred an injury as a result of a defective wire strap on equipment used by the contractor. The injured man recovered against the vessel on the basis of unseaworthiness. It was agreed by both parties in the indemnity action that the injuries incurred by the Plaintiff *were not the result of negligence of either the vessel or the repair contractor.* The Court of Appeals considered that the question before it was whether a contractor who undertakes to do work aboard a vessel *and to supply the equipment essential to the job and who takes over control of the work to be performed,* is liable for the damages incurred by the owner when the contractor's employee is injured because of an unseaworthy condition resulting from the presence of defective equipment which the contractor supplied without fault. The Court found that this question was not involved in either the *Ryan* or *Weyerhaeuser* cases since in each of those cases *the non-discovery of the cause of the injury constituted a negligent omission* of one of the parties, but held that it did not believe that these cases excluded the existence of liability without fault as an element of the warranty of workmanlike service in appropriate cases.

The case is significant, of course, because it indicates a liability without fault theory applied to a breach of the implied warranty to perform the service in a workmanlike manner. It seems clear, however, that the Court restricted the application of this theory to a situation *where the contractor actually supplied his own equipment and a defect in the equipment is the cause of the ensuing injury.*

In *Calmar Steamship Co. v. Nacirema Operating Co.*, (*supra*) the Court of Appeals for the Fourth Circuit re-

versed the decision of the trial court that the shipowner was not entitled to indemnity if its breach of contract was a proximate cause of the injury. The contract between the parties specified that the operator would provide lights for night work. The evidence showed that one of such lights was not "seized" (tied or taped to the cable). The District Court held that the operator breached its contract with the stevedoring contractor in failing to supply a reasonably safe and serviceable light and therefore was not entitled to indemnification. The Fourth Circuit, relying upon *Crumady* (decided after the Lower Court's opinion) concluded that the operator was entitled to indemnity. It recognized that *Crumady* did not undertake a definitive statement of the conduct on the part of the shipowner which would bar indemnity, but believed it indicated that furnishing defective equipment will not necessarily have that effect. Hence, it undertook to "*compare*" actions of *Calmar* with those of the owner in *Crumady* and concluded that they did not preclude recovery. *It is to be noted that in both Calmar and Crumady there was a finding of the stevedoring company's negligence which brought "into play the unseaworthy condition of the vessel."* There was no such finding in the instant case. Indeed the jury's finding was to the contrary.

In the *Revel* case (*supra*) (decided by the same Court as *Calmar* on the same day) the shipowner supplied a defective winch. After reporting the defect and receiving instructions to continue to operate, the stevedore used the winch. The Fourth Circuit referring to *Crumady* concluded that the shipowner was not barred from recovering indemnity because of negligently supplying defective equipment. The Court did not attempt to explore what conduct, in other circumstances, would be "sufficient to preclude recovery". It merely held that in its opinion under the decisions of the Supreme Court the limits were not transcended.

The decision in the instant case is directly in conflict with the decisions of the Third Circuit in *Hagans v. Farrell*

Lines, (*supra*) followed in *Smith v. Pan Atlantic Steamship Corporation*, 161 F. Supp. 422 (E. D. Pa. 1957), affirmed per curiam 254 F. 2d 600 (3rd Cir. 1958), and *Hodgson v. Lloyd Brasileiro Patrimonio Nacional*, (*supra*).

In the *Hagans* case, it was held that the shipowner may not be entitled to indemnity if its breach of contract caused the injury and the stevedore's wrongful conduct consisted only of failing to discover and correct the shipowner's breach. Hence the Third Circuit held the shipowner was not entitled to indemnity from the stevedore where the injury resulted from a defective and unseaworthy winch which contractually was to be furnished by the shipowner and was negligently used by the stevedore but was not the primary proximate cause. By analogy to *Ryan* the Court declared that "the promisor cannot use the promisee's failure to discover and correct the promissor's own breach as a defense" (237 F. 2d 477, 482).

A petition for rehearing was denied with two judges (Chief Judge Biggs and Circuit Judge Maris) dissenting on this basis:

> "It would appear that the decision of this Court unduly limits the scope of the decision of the Supreme Court of the United States in *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation*, 1956, 350 U. S. 124, 76 S. Ct. 232. The decision also seems to us to be in conflict with *American President Lines Limited v. Marine Terminals Corporation*, 9th Circuit 1956, 236 F. 2d 753; *cf. United States v. Rothschild International Steve. Company*, 9th Cir. 1950, 183 F. 2d 181. For these reasons we think that the appeal should be reheard before the Court en banc."

The *Hagans* decision was followed in *Smith v. Pan-Atlantic Steamship Corporation*, 161 F. Supp. 422 (E. D. Pa. 1957), affirmed per curiam (254 F. 2d 600), three days short of the two months after *Weyerhaeuser*. In the *Smith* case, the stevedore's boss permitted his men to continue

to use a defective winch after reporting the defect to the ship's officers. Judge Kirkpatrick granted judgment n.o.v. in favor of the stevedore, the Third-Party Defendant, against the Third-Party Plaintiff, on the authority of *Hagans* (*supra*) reasoning that the stevedore's negligence did not supersede the ship's violation of its duty to furnish seaworthy equipment. He asked the piercing question:

> "Is it part of a stevedoring contract that the stevedore will walk off the job if he finds the ship's equipment unsuitable?"

He answered the question by stating:

> "It may be negligent for him not to do so but it is in furtherance of his contract rather than a breach of it, and the shipowner could hardly hold him liable for trying to complete the work."

The Fourth Circuit in *Revel* (*supra*), a post-*Crumady* decision, and the Second Circuit in *Shannon v. United States*, 235 F. 2d 497 (2d Cir. 1956), a pre-*Crumady* decision, are in conflict with *Hagans* and *Smith* decided by the Third Circuit.

Finally in *Hodgson* (*supra*) the Third Circuit (with the opinion writing judge and one other judge from the panel in this case sitting) had no apparent difficulty in deciding, despite the prior decision in the instant case, that:

> "It was for the jury to determine whether it was unworkmanlike for the stevedoring company to continue operating the winch, which it knew had been defective after receiving a categorical assurance from the shipowner's crew that it was 'O. K.'."

Contrary to the decision in the instant case, the Court held that an appellate Court will not interfere with a judgment entered on a verdict rendered by a jury simply because of its opinion as to the weight or preponderance of the evi-

dence. Moreover, as it did not do in this case, the Court examined the contract and found it required the stevedore to "provide all necessary stevedoring labor, including winchmen . . . and such other stevedore-supervision as are needed for the proper and efficient conduct of the work". The Court held that:

> "Under this agreement, the stevedoring company was not required to act as an insurer against any loss the shipowner might suffer, or to maintain the winches. *Calderola v. Cunard S. S. Co.*, 279 F. 2d 475 (C. A. 2), cert. denied 364 U. S. 884 (1960). Rather, such language constitutes a contractual undertaking by the stevedoring company to perform its services in a workmanlike, proper and reasonably safe manner. *Ryan Stevedoring Co. v. Pan Atlantic S. S. Corp.*, 350 U. S. 124 (1956); *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563, 565 (1958); *Calderola v. Cunard S. S. Co.*, (*supra*). *Whether the stevedoring company's conduct constituted a breach of this provision was, of course, a question of fact for the jury. Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, (*supra*)." (Emphasis added.)

It is apparent that the opinion below is in direct conflict with the decision of this Court in the *Weyerhaeuser* and *Porello* cases and with the decisions of *Harrison* and *Copp* in the Court of Appeals of the Ninth Circuit and *Reddick* in the Second Circuit which are themselves in conflict with other decisions of the same circuits. Moreover, the decision in the instant case is directly in conflict with *Hagans* and *Hodgson* decided both before and after the instant case. *Hagans* was itself declared to be in conflict with *American President Lines*, (*supra*) and *Rothschild*, (*supra*) in the Ninth Circuit by Chief Judge Biggs and Judge Maris of the Third Circuit, (237 F. 2d 477, 483).

Upon this ground of conflict between circuits alone, certiorari should be granted.

Fourth Point: The Issues Involved Herein Are of Paramount Importance to the Survival of the Stevedoring Industry and to the Entire Shipping Industry.

The questions here presented are of paramount importance in the decision of longshoreman cases brought against shipowners and involving third-party actions for indemnity against stevedores, particularly when the contract between stevedores and shipowners is in writing. Settlement of the question by this Court is plainly in the public interest since it is likely to be presented in almost every such case hereafter brought, including many cases now pending.

This decision places in grave doubt whether the express written undertakings and limitation of responsibilities between shipowner and stevedore have any meaning. It is of industry-wide concern that such a written contract can be nullified by imposing the duty on a stevedore to indemnify a shipowner for the breach of an implied warranty, by striking down a jury finding that the express provisions of a contract were not breached. The result reached is all the more untenable in this case since the right of indemnity is predicated on the assumption by the Court of Appeals that "*if* it was negligence on Ellerman's part to permit Beard to work in an unsafe place, it was equally negligent for Atlantic to 'handle' the cargo in an unsafe place to work" (289 F. 2d 201, 207). As in Weyerhaeuser, where several possible bases of negligence as to the shipowner existed there is no way of knowing that the jury did in fact base its finding of the shipowner's negligence on an alleged "unsafe place to work".

If the decision of the Court of Appeals is permitted to stand the encirclement of the stevedore has been completed. Congress passed the Longshoremen's and Harborworkers' Act to establish liability without fault, albeit in a lesser sum. It thereby relieved employers of large tort verdicts. In so doing, absolute liability was imposed upon the employer to

provide a fair measure of compensation to its injured employee. After the Longshoremen'sAct the claim by a shipowner for "contribution" was denied *where joint negligence existed. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282 (1952). Practical business consideration required stevedores to enter into written contracts pursuant to demands of the shipowners to agree to indemnity and hold the shipowner harmless from liability resulting *from the negligence of the stevedore.* Such a contract, if made, is not forbidden by the Longshoremen's Act and is properly enforceable. Such written contracts should be construed cautiously and indemnity allowed only when expressly and clearly assumed. The present case holds the stevedore liable for indemnity without limitation and with no reference whatever to the terms of the written contract.

The result is to make a stevedore wholly liable for all injuries to its own employees in the absence of any showing that its work could have been performed more safely. Thus the financial burden intended to be removed from the shoulders of the stevedore by the Longshoremen's Act has been replaced, although not voluntarily assumed or clearly justified by law or contract. Such harsh consequences can lead to the survival of but a few of the stevedoring firms who possess an infallible degree of "expertise" or a willingness, backed by sufficient wealth, to become an insurer. The end result must adversely affect the entire shipping industry. It is of particular importance to the stevedoring industry that certiorari be granted that it may be clearly understood whether written contracts between stevedores and shipowners defining the respective rights of each are to be disregarded as meaningless or given the recognition intended by the parties.

CONCLUSION.

The issues involved herein are of national importance to the stevedoring and shipping industry. The decision of the Court of Appeals is a major departure from the rulings

made by this Court and if allowed to stand will create further disharmony in the uniform application of the doctrines enunciated by the Court.

This decision is a sharp erosion of the Constitutional mandate that "No fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law." Unless this decision is reversed further erosion of the mandate will surely follow.

Respectfully submitted,

JAMES J. DAVIS, JR.,
FRANCIS E. MARSHALL,
Counsel for Petitioner.

APPENDIX TO PETITION.

JUDGMENT OF THE U. S. DISTRICT COURT.

Before GANEY, *J.*

And Now, to wit: April 28th, 1958, in accordance with the Special Verdict of the Jury and the Direction of the Court, it is ORDERED that Judgment be and is hereby entered in favor of Plaintiff, Leighton Beard, and against the Defendants, Ellerman Lines, Ltd. and The City Line, Ltd., in the sum of One Hundred Thousand and 00/100 ($100,000.00) Dollars, together with costs, and it is

FURTHER ORDERED that Judgment be and is hereby entered in favor of Third-Party Defendant, Atlantic & Gulf Stevedores, Inc., and against Third-Party Plaintiffs, Ellerman Lines, Ltd., and The City Line, Ltd., with costs.

By THE COURT:

Attest: R. J. GREENWOOD,
Deputy Clerk.

ORDER OF THE U. S. DISTRICT COURT.

(Filed April 4, 1960.)

Now, this 4th day of April, 1960, It is Ordered by this Court that Defendants', ELLERMAN LINES, LTD., and THE CITY LINE, LTD., motion to set aside the verdict in plaintiff's favor and to enter judgment in their favor, and their motion for a new trial be, and the same are hereby, denied.[1]

/s/ J. CULLEN GANEY, *Ch. J.*

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1. Reddick v. McAllister Lighterage Line, Inc., et al., 258 F. 2d 297 (C. A. 2, 1958) and cases therein cited. Also see Gindville v. American-Hawaiian Steamship Co., 224 F. 2d 746 (C. A. 3, 1955).

OPINION OF U. S. C. A. 3.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,278.

LEIGHTON BEARD

v.

ELLERMAN LINES, LTD., and THE CITY LINE, LTD.,
Appellants,

v.

ATLANTIC AND GULF STEVEDORES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued October 18, 1960.

Before McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

OPINION OF THE COURT.

(Filed April 7, 1961.)

By KALODNER, *Circuit Judge.*

The plaintiff, Leighton Beard, brought this civil action, founded upon the diversity jurisdiction of the District Court,[1] against the defendants, Ellerman Lines, Ltd.

1. Plaintiff is a citizen and resident of Pennsylvania; defendants Ellerman Lines, Ltd. and The City Line, Ltd., are British corporations.

and The City Lines, Ltd. ("Ellerman"), to recover damages for personal injuries sustained in the course of discharging cargo from the latter's vessel, S. S. "City of Calcutta". Beard was a longshoreman in the employ of Atlantic and Gulf Stevedores, Inc. ("Atlantic"), a concern performing stevedoring services for the vessel. Beard's complaint alleged unseaworthiness and negligence. Ellerman joined Atlantic as third-party defendant, alleging in its third-party complaint that Beard's injuries were the result of Atlantic's negligence in discharging the cargo and in using devices which were "dangerous and improper" in doing so. Ellerman sought indemnity from Atlantic, under their contract, in the event it was held liable to Beard.

The case was tried before a jury, which found in answer to specific interrogatories, in favor of Beard in his action against Ellerman, and against Ellerman in its third-party action against Atlantic. In its answers to the interrogatories the jury found the "City of Calcutta" was unseaworthy and negligent, and Atlantic without fault with respect to the accident which resulted in Beard's injuries. The District Court entered judgment in accordance with the jury's special findings in favor of Beard against Ellerman and in favor of Atlantic against Ellerman in the third-party proceedings. It later[2] denied Ellerman's alternative motions to set aside the verdict in Beard's favor or for a new trial.

Ellerman has appealed, asserting in sum that the evidence failed to establish unseaworthiness or negligence on its part; that the jury's finding that Atlantic was not negligent is inconsistent with its finding of negligence against Ellerman since if there was any negligence it was that of Atlantic; and that Ellerman is entitled to indemnity from Atlantic as "a matter of law", if we find that the

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2. Ellerman's motions were filed May 7, 1958 and orally argued on June 24, 1959. The District Court's Order denying the motions was filed April 4, 1960.

record sustains a finding of negligence in the discharge of the cargo.

The District Court did not file an opinion and it is necessary for that reason to set forth the facts in some detail:

On July 1, 1955, the "City of Calcutta" docked at a pier in Philadelphia. In its cargo were bales of burlap which had been loaded aboard in India. The bales each contained 30 to 40 bolts of burlap, enclosed in a burlap covering. Each bale, weighing between 1,000 to 1,200 pounds, had been compressed under tremendous pressure and circled with four parallel one-inch steel bands fastened together with a patented clip or buckle. Sixty-three tons of the bales, consigned to New York, were stowed in the forward end of the hold, which, by reason of the shear of the vessel, extended out halfway into the square of the hatch; and 100 tons of the bales, consigned to Philadelphia, were stowed toward the after end of the deck. The bales were stowed on their flat in tiers to the same height, and three was no separation between them except for their markings.

Atlantic's longshoremen started discharging the cargo at about 1.30 P. M. They used what are known as bale or burlap hooks which consist of a metal ring to which six lengths of manila rope are attached. At the opposite end of each rope there was a special flat metal hook. Two of these hooks were inserted under two bands of each of three bales by four longshoremen, two on each side of the bales, and a fifth man put the ring on the cargo hook at the joined ends of the runners from the cargo winches and gave the signal for the draft to be hoisted. The draft was then moved out into the square of the hatch under the hammer of the boom, which was positioned over Philadelphia bales, and hoisted out of the hold, across the ship and then lowered on to the pier.

The first of the bales were removed from the center of the hatch and then the bales were moved out from the wings one row or tier at a time. The New York bales were

not touched. There was enough space between the top tier of bales and the underside of the 'tween deck for the longshoremen to walk into the wings, and as a draft was hoisted they retreated into them.

At about 4.30 P. M. (three hours after the unloading had begun), when two tiers of the Philadelphia cargo had been discharged, a draft of three bales was attached to a set of burlap hooks by the longshoremen. These bales were in a row in the offshore wing under the coaming with approximately 12 feet of space above. As the draft, in the course of its hoisting, neared the coaming of the main deck hatch the middle bands of one of the bales broke and when the entire weight of the bale was placed upon the other band it too broke, and the bale dropped onto the New York bales, bounced off, bounded across one-half of the hatch, then some 20 to 25 feet astern of the after coaming, and struck Beard, pinning him against the after bulkhead.

Beard was taken to the hospital where his right leg was amputated, first below the knee and shortly thereafter above the knee. He was 41 years old at the time.

The facts, as stated, are not in dispute, nor is there any question presented here with respect to the amount of the jury's award of damages to Beard.

There was considerable testimony at the trial, expert and otherwise, that it was the custom in Philadelphia to use bale hooks in discharging bales similar to the type here involved, known as "gunnies"; that the Safety Rules for the safe handling of cargo, prepared by the Philadelphia Marine Trade Association, and used by stevedore personnel in Philadelphia, approved this procedure.

There was also testimony, by way of deposition of Donald Quinn chief officer of the "City of Calcutta" that Quinn had observed the manner in which the vessel's cargo of bales of wool as well as the bales of burlap were being discharged by Atlantic's men and that "they were going very quickly"; that Quinn had told one of Atlantic's men "with a bit of authority" that he thought the use of bale

hooks in discharging the bales of wool "was a dangerous way of discharging" and that he was informed "it was the custom of the port". Quinn also said that he had "explained" to Atlantic's men that "in India they get wire slings and put them around the bales so that each individual bale has a wire around it, and as they hold it tight, the wire tightens around it."

Quinn, however, did not direct Atlantic's men to discontinue their method of discharging the bales. There was expert testimony that the chief mate is responsible for the safety of personnel engaged in cargo operations and that his authority outranks the stevedore boss.

An expert metallurgist who had tested steel bands similar to those used here testified that in his opinion the particular bands on the bale that broke and struck Beard had "something wrong with the materials".

The foregoing presents the factual situation as presented to the jury.

On this appeal Beard contends that the jury's finding of unseaworthiness is amply supported for these reasons: "Ellerman had actual and constructive knowledge that the burlap bales would be hoisted out of the hold by use of hooks inserted under the bands of the bales", and, "It was therefore charged with the absolute duty of supplying bands to permit that activity to be accomplished in reasonable safety"; in the instant case "the bands were inadequate", and the burlap bales created an unseaworthy condition because they were not capable of "being handled for the purpose of loading and discharge" by the bale hook method customary in Philadelphia.

Beard further contends that the jury's finding of negligence on Ellerman's part was supported by the testimony that Ellerman had failed to provide him with a "safe place to work" in that (1) Ellerman breached its duty "to use reasonable care to ascertain the methods and manner in which the work was done and to forbid the use of a method which was hazardous to his [Beard's] safety" and the failure of the chief mate to take effective

measures to prevent an unsafe method of discharging the burlap bales constituted negligence; further (2) Ellerman's "failure to discharge the New York bales in that port rendered the place of work unsafe and the defendant negligent", inasmuch as had the New York bales been discharged in New York the bale which had dropped would "normally strike a flat surface and roll or bounce but a few feet", while here the dropped bale "bounced off and rolled all the way to the after bulkhead of the No. 1 hold, one-half the distance of the square of the hatch, and in addition, 20 to 25 feet underneath the after 'tween deck."

Atlantic's position is that the jury's finding, in answer to Interrogatory No. 4, that the "fault" of Ellerman did not "arise out of any failure" on its part, was supported by the evidence that its use of the bale hook method was customary and not negligent; that the jury's finding that Ellerman was negligent could properly have been premised on its failure to provide Beard with a "safe place to work" in that it had not discharged the New York bales at that port and they were so stowed that Beard was exposed in the discharging operation to the catapulting of the dropped bale which caused his injuries.

Atlantic contends that, for the reasons stated, the jury's finding with respect to it is not inconsistent with its finding that Ellerman was negligent.

The District Court, in its charge, dealt with the theories of Ellerman's negligence advanced by Beard.

On the score of the jury's finding, in answer to Interrogatory No. 2, that Ellerman was negligent, Ellerman[3] and Atlantic both urge that the answer fails to disclose whether it was based on (1) use of the bale hook method in discharging the burlap bales; or, (2) failure of Quinn, Ellerman's chief mate, to stop Atlantic from pursuing the bale hook method of discharge which he had characterized as "dangerous"; or, (3) failing to provide Beard with a

3. Ellerman says: "It is impossible to tell what conduct by Ellerman was found to constitute the conclusion 'negligence'".

safe place to work in view of Ellerman's failure to discharge the New York bales at that port and their position with relation to the bales which were being discharged at the time of the accident.

Interrogatory No. 2 which presented to the jury the issue as to whether Ellerman was negligent reads as follows:

> "Was there negligence on the part of Ellerman Lines, Ltd., which was a substantial factor in causing injuries to the plaintiff?"

The jury's answer to the interrogatory was "Yes".

In disposing of Ellerman's appeal from the jury's finding that its negligence "was a substantial factor in causing injuries to the plaintiff", we are required only to determine whether there was substantial evidence adduced at the trial with respect to any one of the three theories of negligence on Ellerman's part which measured up to the applicable standard of legal proof and thus permitted the jury's fact-finding that Ellerman was negligent.

On the score of whether the record affords a substantial basis for a finding that Beard's injuries were caused by *somebody's* negligence in the discharge of the burlap bales this extraordinary situation presents itself:

Both Ellerman and Atlantic do not really question that sufficient evidence was adduced in the record to establish that Beard was injured as a result of negligent conduct of the discharging operation; indeed they virtually concede that the record establishes such negligence—they only differ as to the nature of the negligent acts and with respect as to who was guilty of the negligent conduct.

Says Ellerman, in its brief:[4]

> "We dispute that Ellerman was negligent and assert rather that the negligence here was *solely* that of the stevedore [Atlantic]." (Ellerman's emphasis.)

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4. Page 22 "Brief for Appellant".

That statement was made in consonance with Ellerman's position that Atlantic was in full control of the discharging of the cargo; it was an "expert in the field"; "It was Atlantic's method of pulling out the cargo, not Ellerman's"; "Ellerman would not be negligent for failing to either supervise or take over and itself perform the details of the work"; and, while Atlantic's negligence would make Ellerman liable to Beard, Ellerman was thereby entitled to indemnity from Atlantic under their contract for stevedoring services because of Atlantic's "sub-standard" performance.[5]

Atlantic, replying to Ellerman's contention here that the jury's finding of negligence on its part was inconsistent with its finding, in answer to Interrogatories Nos. 4 and 5, that Atlantic was free of fault, made this statement in its brief:[6]

> "Appellant [Ellerman] conveniently fails to acknowledge that other issues were submitted *upon which the Jury could properly have found negligence on the part of the shipowner.* Plaintiff, through his counsel, contended that Ellerman was negligent in failing to provide Plaintiff with a safe place to work. Evidence was offered which established that certain New York cargo was not removed at that port, was stowed in a position exposed to this unloading operation and was the very means by which the falling bale was catapulted against Beard. . . .
>
> ". . . *The Jury could properly find and by its verdict undoubtedly did find that Ellerman was guilty of negli-*

5. In its third-party complaint against Atlantic, Ellerman averred that if it should be held liable to the plaintiff "then the third party is liable over" to it "by reason of" Atlantic's failure "to properly perform the work of unloading"; Atlantic "*was negligent in the manner in which it undertook to unload cargo*"; Atlantic "supplied and used devices in connection with the unloading . . . which were dangerous, improper and, in addition, violated the terms of the [stevedoring] agreement." (Emphasis supplied.)

6. Pages 8-9 "Brief for Atlantic and Gulf Stevedores, Inc., Appellee".

gence in stowing the New York cargo with the Philadelphia cargo in the center of the hatch opening.

"From the description of the accident by all the eyewitnesses, *it is clear that the accident would not have occurred had the falling bale not struck the New York cargo and rolled under the coaming against Beard.* (emphasis supplied).

In view of what has been said it is unnecessary for us to discuss in detail all the evidence relating to the issue of negligence. We have but to say that the record affords ample basis for the jury's finding that Ellerman was negligent.

For example, there was evidence that bands of bales "broke" in "roughly between 3 and 5 percent of the bales" during discharging operations.[7] It is true that there was considerable testimony, as earlier stated, that it was the custom in Philadelphia to use bale hooks in discharging burlap bales and that the method was approved by the Philadelphia Marine Trade Association, but as we held in Curtis v. Carcia Y Cia., 272 F. 2d 235, 237 (1959) "such custom, though it may be evidence of reasonableness, is not conclusive," and the jury may find, if there is sufficient basis in the testimony, that the customary method does "not satisfy the standard of reasonable care."

Further, there was testimony by Ellerman's own chief mate, Quinn, earlier referred to, that in his opinion the use of bale hooks "was a dangerous way of discharging", and that he had "explained" to Atlantic's man that in India, in handling burlap bales they used the sling method.

On the score of Quinn's testimony it must be said that his failure to take effective measures to stop the use of the discharge method which he condemned as "dangerous", would constitute negligent conduct for which Ellerman was liable in the event of a jury finding that the discharging procedure was in fact "dangerous", as he deemed it to be.

7. Testimony of Captain William Wheeler, associated with a firm of marine consultants.

Also, there was testimony that those engaged in the task of discharging the bales were exposed to a hazardous situation, by virtue of the stowage of the New York bales with respect to the bales which were being unloaded, and thus were not afforded a "safe place to work", which is, of course, negligence on the part of those responsible. The testimony on this score, as earlier stated ,was deemed ample by Atlantic, an expert in the field, to sustain a finding that Elerman had failed to provide "a safe place to work".

It is settled law that Ellerman owed to Beard the obligation to provide him with a safe place to work, and its failure to do so constituted negligence.

It is equally settled that Ellerman was under a duty to use methods which complied with the standard of reasonable care in the discharge of its cargo, and to forbid the use of a discharge method by the stevedore of its selection which did not conform to a standard of reasonable care.

"The work of loading and unloading is historically 'the work of the ship's service' ", as the Supreme Court said in Crumady v. The J. H. Fisser, 358 U. S. 423 (1959).

Whatever inconsistency Ellerman sees in the jury's answers to Interrogatories Nos. 2 (in which it was held negligent) and 4 (in which Atlantic was absolved from liability over to Ellerman), it is not one which aids Ellerman in Beard's action against it. In answering Interrogatory No. 2, the jury was determining the issue of negligence between Beard and Ellerman. In answering Interrogatory No. 4, the jury was determining, necessarily, the contractual obligation of Atlantic to Ellerman. The issue for us on appeal with respect to this Interrogatory is whether as a matter of law Atlantic can be relieved of its contractual obligation in any circumstance of this case. The fact, that the jury believed either that the contractual obligation of Atlantic to Ellerman did not coincide with the duty of Ellerman to the plaintiff, or that Atlantic properly discharged its contractual obligations, if erroneous, would not require that we reverse the finding of liability as between the plain-

tiff and Ellerman, if that finding is supported by the evidence, as we have found that it does.

What has been said brings us to Ellerman's contention that if it "is liable to Beard upon a theory of negligence . . . the undisputed evidence required the District Court to enter . . . judgment in Ellerman's favor [against Atlantic] because it was clearly Atlantic's action which brought about the result and clearly it constituted a breach of a warranty of workmanlike service."

Our consideration of Ellerman's contention is controlled by the principles recently summarized in Waterman Co. v. Dugan & McNamara, 364 U. S. 421, 423 (1960), as follows:

> "In *Ryan Co. v. Pan-Atlantic Corp.*, 350 U. S. 124, it was established that a stevedoring contractor who enters into a service agreement with a shipowner is liable to indemnify the owner for damages sustained as a result of the stevedore's breach of his warranty to perform the obligations of the contract with reasonable safety. *This warranty of workmanlike service extends to the handling of cargo, as in Ryan, as well as to the use of equipment incidental to cargo handling,* as in *Weyerhaeuser S. S. Co. v. Nacirema Co.*, 355 U. S. 563. The warranty may be breached *when the stevedore's negligence does no more than call into play the vessel's unseaworthiness. Crumady v. The J. H. Fisser*, 358 U. S. 423, 429. . . ." (emphasis supplied).

Application of the principles stated to the indemnity action compels the determination, under the particular facts here and the jury's finding with respect to Ellerman's negligence, that Ellerman is entitled to indemnity from Atlantic as a matter of law.

As already pointed out, the record affords ample basis for a jury fact-finding that (1) use of the bale hook method in the discharge of the burlap bales constituted negligence, and (2) that the injured longshoreman was not afforded a safe place to work.

Atlantic suggests that the jury's finding that Ellerman was negligent was based on its failure to provide a safe place to work in view of the fact that the New York cargo "was stowed in a position exposed to this unloading operation and *was the very means by which the falling bale was catapulted against Beard*", and says that *"the jury could properly have found negligence on the part of the shipowner"* in this situation, *and "it is clear that the accident would not have occurred had the falling bale not struck the New York cargo and rolled under the coaming against Beard."* (emphasis supplied.)

Atlantic hoists itself on its own petard in stating that the evidence established that the New York stow, as positioned when the Philadelphia bales were being discharged, created an unsafe place to work.

Under the principles above stated, the "warranty of workmanlike service to perform the obligations of the contract with reasonable safety", extends to the handling of the cargo, and thus if it was negligence on Ellerman's part to permit Beard to work in an unsafe place, it was equally negligent for Atlantic to "handle" the cargo it charged, created an unsafe place to work.

It was Atlantic's conduct in proceeding to unload cargo in an unsafe place to work which "called into play" the unsafe condition which prevailed, and under Crumady v. The J. H. Fisser, *supra,* it breached its warranty to Ellerman.

What was said in American President Lines v. Marine Terminals Corp., 234 F. 2d 753, 759, 60 (9 Cir. 1956), cert. den. 352 U. S. 926, is significantly applicable here:

> ". . . We are not concerned here with a situation in which the stevedore's breach of duty brings about the injuries by operation upon a prior condition caused by the shipowner's negligence which is unknown to the stevedore. Here the stevedore was fully informed of the fact and of the possible consequences of the shipowner's negligence . . . and in face of all that

> proceeded to breach its duty so as to make that negligence an immediately dangerous force . . .[I]t was the stevedore's breach of duty that created the danger and made it an active condition with immediately forseeable consequences of personal injury."

The "expertise" of Atlantic in the handling of cargoes should have made it aware of the dangers inherent in the discharge of the Philadelphia bales in view of the presence of the New York stow. If a jury could "properly find", as Atlantic urges, that Ellerman was negligent in permitting the discharge under the circumstances which prevailed, because of their obvious dangers, it certainly follows that Atlantic, an expert in the field of handling cargo, should have shown an awareness of the situation and taken steps to avoid that which happened or refused to proceed with the discharge of the cargo until the site of discharge was made "a safe place to work."

It must here be noted that the District Court in its charge to the jury with respect to the indemnity action failed to instruct it that if Atlantic carried on the discharge of the Philadelphia bales in a place unsafe to work that it was guilty of a breach of its "warranty [to Ellerman] to perform the obligations of the contract with reasonable safety."

The District Court erred in this respect and to its error may be attributed the fact that the jury, in its answer to Interrogatory No. 4 acquitted Atlantic of "any failure . . . to do its work in accordance with its contractual obligation."

Further, in its charge to the jury the District Court prescribed the "criterion", as it put it, of Atlantic's performance of its contract, as follows:

> "You will have to decide whether or not there was an unreasonable discharge of this cargo, an unsafe method used in the discharge of this cargo, in the placing of the hook."

The phrasing of this instruction was such that it made the sole "criterion" of the jury's test as to whether Atlantic had breached its contract of "workmanlike service" in the use of the bale hook method in discharging the cargo.

The error of this instruction, as well as the error committed when the District Court failed to instruct the jury that it was a breach of Atlantic's contract to carry on the discharging operation in an unsafe place to work, was further compounded by a last-minute instruction to the jury, following conclusion of the charge in chief, and just before the jury retired. The instruction referred to follows:

> "If you find that Atlantic & Gulf Stevedores, Mr. Marshall's client, was unloading the bales in a proper and safe manner, *using a method that was in accordance with the practice, customs, and usage in the Port of Philadelphia,* and that that was not in violation of their breach of contract which obtained between them, *then your verdict must be in favor of the Atlantic & Gulf Stevedores.*" (emphasis supplied.)

It may be noted that exception was taken to this instruction by Ellerman.

In summary, we are of the opinion that the testimony adduced afforded ample basis (as Atlantic itself says) for a jury finding that the discharge of the Philadelphia bales was carried on in an unsafe place to work and while that finding made Ellerman liable to Beard it also made Atlantic liable, as a matter of law, to Ellerman for indemnity for its breach of warranty as previously detailed.

The opinion stated makes it unnecessary for us to consider the issue of unseaworthiness [8] which was premised on Beard's view that the doctrine of unseaworthiness ex-

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8. Hudgins v. Gregory, 219 F. 2d 255 (4 Cir. 1955).

tends to the packaging of the ship's cargo;[9] and that the cargo in the instant case was "unseaworthy" by reason of the "inadequacy" of the steel bands used to bind the burlap bales.

For the reasons stated the judgment of the District Court in favor of the plaintiff Leighton Beard and against the defendants, Ellerman Lines, Ltd. and The City Line, Ltd. will be affirmed, and the judgment in favor of the third-party defendant, Atlantic & Gulf Stevedores, Inc. and against the third-party plaintiff, Ellerman Lines, Ltd. and The City Line, Ltd. will be reversed, and the cause remanded with directions to the District Court to proceed in accordance with this opinion.

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9. It may be noted that plaintiff relies in this respect on the holding of the Second Circuit in Reddick v. McAllister Lighterage Co., 258 F. 2d 297 (1958), cert. den. 358 U. S. 908 where it was said (p. 299):

". . . the holding of unseaworthiness may also be predicated on the latent defect in the cargo crate". But see Carabellese v. Naviera Aznar, S. A., 285 F. 2d 355 (1960) where the Second Circuit limited *Reddick* to its particular facts and said it was "not disposed" to extend the doctrine of unseaworthiness to include "cargo safe to handle".

ORDER OF U. S. C. A. 3 DENYING PETITIONS FOR REHEARING.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,278.

LEIGHTON BEARD

v.

ELLERMAN LINES, LTD., AND THE CITY LINE, LTD.,

v.

ATLANTIC AND GULF STEVEDORES, INC.

SUR PETITION FOR REHEARING.

Present: McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

AFTER DUE CONSIDERATION THE PETITIONS FOR REHEARING IN THE ABOVE-ENTITLED CASE ARE HEREBY DENIED.

By THE COURT,

KALODNER, *Circuit Judge.*

DATED:
May 31, 1961.

ORDER OF U. S. C. A. 3 STAYING ISSUANCE OF MANDATE.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,278.

LEIGHTON BEARD

v.

ELLERMAN LINES, LTD., AND THE CITY LINE, LTD.,
Appellants,

v.

ATLANTIC & GULF STEVEDORES, INC.

Present: McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

It is ordered that issuance of the mandate in the above case be, and it is hereby stayed until August 4, 1961.

By THE COURT,

KALODNER, *Circuit Judge.*

June 9, 1961.

JUDGMENT OF U. S. C. A. 3.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,278

LEIGHTON BEARD

v.

ELLERMAN LINES, LTD., AND THE CITY LINE, LTD.,
Appellants,

v.

ATLANTIC & GULF STEVEDORES, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: McLAUGHLIN, KALODNER and HASTIE, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in favor of the plaintiff Leighton Beard and against the defendants Ellerman Lines, Ltd. and The City Line, Ltd., be and the same is hereby affirmed, with costs; and the judgment in favor of the third-party defendant, Atlantic & Gulf Stevedores, Inc. and against the third-party plaintiff, Ellerman Lines, Ltd. and The City Line, Ltd. be, and the same is hereby reversed, with costs; and the cause remanded with directions to proceed in accordance with the opinion of this Court.

ATTEST:
IDA O. CRESKOFF,
Clerk.

April 7, 1961